Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

DEBORAH L. FISHER,

Petitioner,

v.

HARRY VANLOVEREN, M.D.; BRADLEY MULLEN, M.D.; BRAD OSBORNE, M.D.; MAYFIELD NEUROLOGICAL INSTITUTE, INC.; THE GOOD SAMARITAN HOSPITAL,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals First Appellate District of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner challenged in State Court the constitutionality of allowing a case to pend for over eighteen years in the legal system; the unknowing waiver of a "trial by jury"; and the retroactive application of new case law to a deny a jury trial to a victim injured eighteen years earlier. Petitioner asserted as well that if a physician is going to claim a State immunity from suit, that the patient should be given notice of such relationship prior to receiving treatment. Finally, petitioner challenged the holding that respondeat superior requires actual knowledge by the master and the holding of Comer v. Risko which misstates the law of agency in that a plaintiff must procedurally suc both the master and servant before the master can be liable.

The questions presented are as follows:

1. Did the Ohio Supreme Court err in finding no due process was violated in allowing a case to pend for eighteen years before finally granting defendant's third motion for summary judgment?

2. Did the Ohio Supreme Court err by holding that a patient's constitutional right to a trial by jury was unknowingly waived where an attending surgeon at a private hospital utilizes a resident physician who is involved in a State university program (from another hospital) who later claims immunity as a State employee?

3. Did the Ohio Supreme Court err in allowing the lower courts to apply case law from 2005 to the

facts of this case which occurred in 1991 to deny petitioner's right to a jury trial of her factual issues?

4. Did the Ohio Supreme Court err in upholding the lower court's finding that *respondeat superior* requires actual knowledge by the master that the servant was negligent before the master can be liable?

5. Did the Ohio Supreme Court err in its ruling in *Comer v. Risko* holding that a plaintiff must sue both the master and servant before a master can be liable under *respondeat superior*, which is contrary to settled principles of agency law?

6. Did the Ohio Supreme Court and the lower courts err in denying petitioner her Constitutional due process right to a jury trial when the record demonstrates clear unresolved issues of material fact?

7. Did the Ohio Supreme Court and lower courts err in granting summary judgment to defendants when a physician creates an operative report only after being sued and almost two years after the surgery?

LIST OF PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner: Deborah L. Fisher

Respondents: Harry VanLoveren, M.D.; Bradley Mullen, M.D.; Brad Osborne, M.D.; Mayfield Neurological Institute, Inc.; The Good Samaritan Hospital.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Deborah L. Fisher, petitions for a writ of certiorari to review the judgment of the Court of Appeals First District of Ohio and the denial of jurisdiction of the Supreme Court of Ohio.

OPINIONS BELOW

The Hamilton County Court of Common Pleas (Ohio) issued it decision on April 24, 1997 (Appendix 49a ["App."], infra,) granting summary judgment to defendants VanLoveren, M.D. and Osborne, M.D. and Mayfield Neurological Institute, Inc. The court denied the hospital's motion for summary judgment given Mullen's "agency relationship with Good Samaritan for the imposition of respondeat superior liability."

Defendant Bradley Mullen, M.D., personally raised the defense of state employee immunity and was found by the Ohio Court of Claims to be immune from suit in the Court of Common Pleas, individually.

After through the years denying several further motions for summary judgment by the hospital over the course of many years, (Appendix ["App."] 49a; 39a; 29a] the Hamilton County Court of Common Pleas (Ohio) entered an Order on March 1, 2007 [App. 19a], finally granted summary judgment to the remaining defendant, Good Samaritan Hospital relying upon a 2005 decision from the Ohio Supreme Court.

JURISDICTION

The denial of jurisdiction by the Ohio Supreme Court was filed on January 28th, 2009 [App.57a]. This

petition is accordingly filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction over the appeal is invoked pursuant to 28 U.S.C. §§1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT V, PROVIDES IN PERTINENT PART:

> No person shall be ... deprived of life, liberty, or property, without due process of law[.]

THE CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, PROVIDES IN PERTINENT PART:

> Section 1. ... No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code § 9.86 Immunity of public officers and employees.

> ..... no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Effective Date: 03-13-1980

Ohio Revised Code Chapter 2743: Court of Claims Ohio Revised Code 2743: State waives immunity from liability.

> (A)(1) The state hereby waives its immunity from liability, ... and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties....
>
> (2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for the officer's or employee's acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16...

Effective Date: 09-26-2003; 03-31-2005; 01-13-2005

Ohio Revised Code § 2743.03(C) (1):

A civil action against the state shall be heard and determined by a single judge.

Ohio Revised Code §2743.11

"No claimant in the court shall be entitled to have his civil action against the state determined by a trial by jury."

STATEMENT OF THE CASE

This is a medical negligence claim filed Dec. 17, 1991, against the neurosurgeon (VanLoveren) [and his corporation Mayfield Neurological, Inc.]; the neurosurgery resident (Mullen); general surgery resident (Osborne) and the hospital (Good Samaritan). Defendant neurosurgical-resident physician Mullen raised the issue of "immunity" by claiming he was an employee of the State as a medical resident in the University of Cincinnati medical school (a State owned institution). Plaintiff, therefore, had to file a collateral suit against the State of Ohio (Mullen's employer) which will respond to Mullen's liability in the Ohio Court of Claims . The Ohio Court of Claims held that Mullen, was a "state employee" and entitled personally to immunity on January 7, 1998, and stayed the case in that court until the common pleas trial court resolved the other non-State parties liabilities.

MEDICAL AND LEGAL FACTUAL BASIS:

In 1990, Petitioner, Deborah Fisher was a 32-year-old woman engaged to be married and working in the security department at Procter & Gamble. She began experiencing progressive headaches over approximately a one year period. She sought treatment with defendant, Mayfield Neurological Institute, where she was seen and treated by defendant neurosurgeon, Dr. VanLoveren. She was diagnosed with a benign brain tumor (a craniopharyngioma). She was admitted to Good Samaritan Hospital (a private hospital) on 12/18/90 for drainage and removal of the tumor. On 12/20/90 surgery was performed by Defendant VanLoveren

assisted by neurosurgery resident Dr. Mullen, a first year resident.

Post-operatively Petitioner's condition deteriorated manifested by swelling within the brain (increased cranial pressure or "ICP") and resulting bradycardia (decreased heart rate) and ominous neurological signs (unequal pupils; body posturing). The failure to monitor Petitioner during this post-operative period was a critical error by defendants. Ominous signs began on December 21, 1990. However, by December 23-24, and particularly December 24, even the nursing staff was concerned. The medical records of December 24th show only the two residents there in the morning. Defendant VanLoveren claims he was there but there is no record of that. Defendant Mullen, the senior resident, left the hospital to be with family leaving first year resident defendant Osborne alone to monitor. Osborne made at least three phone calls to Mullen throughout the day, but Mullen never came back to the hospital. Although Osborne had the ability to call VanLoveren directly he did not. Eventually in the evening of the December 24, 1990, the nurse (Athenas) testified in her deposition that she threatened Osborne that if he did not call VanLoveren she would. Osborne finally called (about 11:00pm) and VanLoveren, who was about a 40 minute drive distance away, arrived about midnight and took immediate measures to reduce the brain swelling. By that time significant and permanent brain damage had occurred.

VanLoveren, the "attending," has admitted he has the ultimate medical responsibility for his patient. [VanLoveren Depo. p. 57, l. 17-20]. Since the attending physicians cannot be at the patient's bedside

at every moment, hospitals depend on resident physicians to watch and monitor patients in the attending's absence.

Throughout the depositions, it was defendants themselves who repeatedly used "we" and "team" in discussing the care rendered. The hierarchy was: attending physician (VanLoveren); senior resident (Mullen); and first year resident (Osborne).

Unfortunately plaintiff's condition was not closely monitored during the several days following surgery and she developed ICP and serious permanent brain damage. She now is unemployable and dependent for everyday living. Plaintiff's expert, Dr. Rutberg, testified that there were "signs" even as early as December 21st that should have alerted defendants of problems. [Rutberg depo. p. 66]

Defendants attempted to utilize the "team" defense in trying to get Dr. Rutberg to exonerate each individual. The defense attempted to sever each defendant, individually, from liability as joint tortfeasors, prompting Petitioner's expert neurosurgeon (Dr. Rutberg) to testify: "I am troubled by this because is a team approach." [Rutberg depo. p.80]. The whole of Dr. Rutberg's deposition testimony sets forth his opinion (consistent with the affidavits) that the physicians comprising the team caring for Ms. Fisher did not render the appropriate standard of care. In fact, when pressed by defense, Dr. Rutberg even expanded his affidavit opinion: "My cutoff still is the 23rd. I really think the 23rd, in the midst of everything else."

The most blatant error is the trial court's summary judgment in contradiction to direct evidence creating an issues of fact. Plaintiff's filed the affidavit (and deposition) of board-certified neurosurgeon, Dr. L. David Rutberg and the mirror affidavit of Dr. Barrish [T.d.97]. Both affidavits state:

¶ 5: In my opinion within a reasonable degree of medical probability, the physicians and nurses responsible for Ms. Fisher on December 24, 1990, failed to render to Ms. Fisher the appropriate standard care requisite under the circumstances on December 24, 1990.

¶ 6. Based upon her clinical presentation as documented in the medical records, she clearly showed signs and symptoms of neurological deterioration throughout the day on December 24, 1990.

¶ 7. In my opinion within a reasonable degree of medical probability, the failure to provide appropriate monitoring surveillance by Dr. Osborne and Dr. Mullen and nurse Tenover and the failure to take action upon the clinical signs and symptoms demonstrated by Ms. Fisher on December 24, 1990, caused serious neurological damage to Ms. Fisher.

¶ 8. It is further my opinion within a reasonable degree of medical probability that had the appropriate standard of care been rendered to Ms. Fisher on December 24, 1990, she probably would not have sustained the neurological damage which she did. Such damage is permanent in nature.

Defense attorney for Van Loveren asked at deposition:

Q: **Other than what is stated in the affidavits**, do you believe that the care provided by Dr. Van Loveren was within accepted medical standards?

A: Yes, sir. [p. 44]

* * * *** * * * **

Q: I think earlier you had stated that your opinions regarding the care provided by Dr. VanLoveren you had no other opinions as to the care provided by Dr. Van Loveren **other than what was stated in the affidavits**?

A: That's correct. [p.53]

Q: I see. So now it is your testimony that Dr. Van Loveren deviated from the standard of care by not pursuing it on the 22nd, since he was the attending physician?

A: Whoever was ultimately in charge should have had a CAT scan, in my opinion, yes. .... Dr. Mullen should have reported it to Dr. VanLoveren, and Dr. VanLoveren was in charge, yes. [p.63]

Near the end of the 3-1/2 hour deposition, Dr. Rutberg stated his view that if the deposition testimony of Nurse Athanas was part of the record (which it was with the court), then defendant Dr. Osborne, the first year resident, was negligent in not doing more because he should not have had to be coaxed to call Dr. VanLoveren. [p.81]. This was apparently ignored by the lower courts in granting summary judgment to Osborne and Good Samaritan Hospital.

Q: And again, so that there is no surprises at trial, if Dr. VanLoveren would testify that he

> was present at the hospital on the 24th and saw the CAT scan before noon on the 24th and reviewed it personally, do you have an opinion as to whether or not he deviated from the standard of care under what you see in the records from that point on?
>
> A: If he saw that CAT scan and he saw her deteriorating, then I think he shouldn't have waited until 12:00 midnight to put in the intraventricular catheter, so I would consider that a deviation, honestly. [p.82]

Defendant VanLoveren testified:

> A: On the 24th, in the morning, at least, the initial concern was about hydrocephalus, expansion of ventricles, so at least by midmorning, I looked at that scan myself. [VanLoveren depo. p.12, l. 15-21].

Dr. Rutberg did clearly express expert opinions against all three physician defendants. The trial court's grant of summary judgment in contradiction to such direct evidence blatantly disregards issues of fact.

Defendant VanLoveren, as attending physician, testified that he has the ultimate medical responsibility for his patient, Deborah Fisher. Defendant hospital and defendant physicians owe a duty to Ms. Fisher to have made a "complete and timely" medical record. The hospital did not comply with the Joint Commission on Accreditation of Hospitals standards or ORC 3701.74. Defendants' duty to make a timely and complete medical record is not only to protect the patient's medical well-being, but

also to protect the patient's legal rights (*Joint Commission on Accreditation of Hospitals Manual*).

The appellate court states as fact, "When Dr. Mullen refused to dictate the operative report, Dr. Van Loveren dictated the note himself." [App. 10a] giving the impression that it was done contemporaneously. In fact, there was a gap of nearly two years between the surgery and the dictation, a fact the appellate court simply ignored.

The record reflects Van Loveren knew Mullen did not dictate the Operative Report soon after surgery. The record includes depositions from the hospital medical records personnel who testified that because of the absence of a dictated report, deficiency notices were sent out threatening revocation of privileges. However, the hospital never followed through with their own policy to suspend privileges due to this omission. And the record shows than an Operative Report dictated by VanLoveren magically appeared in 1992, after suit was filed. Certainly the credibility and reliability of very detailed specific factual assertions created almost two years post surgery are questions of fact for a jury; and cannot be conclusive facts as a matter of law.

Summary judgment and the denial of a jury trial were clearly inappropriate on the state of this record. Nonetheless, the trial court granted summary judgment to physicians VanLoveren (and his corporation, Mayfield Neurological, Inc.) and Osborne. Dr. Mullen, asserting his personal "immunity" as a state employee, was dismissed from the suit, which then required plaintiff to bring suit in the Ohio Court of Claims against the State of Ohio

(which would be responsible for Mullen's negligence), but which deprived plaintiff of her right to trial by jury.

On May 21, 1997, the trial court denied summary judgment to the hospital finding that the plaintiffs' expert testimony "creates a *respondeat superior* liability issue as to Good Samaritan Hospital" [App. 46a]. On Feb. 13, 1998, the trial court denied the hospital's "supplemental" motion for summary judgment [App.39a]. On April 28, 1998, defendants VanLoveren and Mayfield were granted summary judgment. Plaintiff argued that to deny a jury trial when material issues of fact are present violate petitioner's Constitutional due process right to a jury trial citing and quoting *Anderson v. Liberty Lobby, Inc.* 106 S. Ct. 2505 (1986).

Three years later, on February 6, 2001, the trial court judge recused himself and the case was transferred to a new trial judge. Four years later, on August 12, 2005 the new judge denied another motion for summary judgment by the hospital. [App. 29a] And it was again denied on August 19, 2005. [App. 25a] Defendant hospital again moved for summary judgment on August 16, 2006, now arguing *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559 (2005). The trial court finally granted said motion on March 1, 2007 (**16 years after filing**) relying upon the 2005 *Comer* case! [App. 19a]

An appeal was timely taken and seventeen (17) months later the appeals court affirmed, holding Petitioner "had no right to any trial...let alone a jury trial." [App. 18a].

Petitioner moved for review by the Ohio Supreme Court asserting that an eighteen (18) year wait for a judicial determination denies Due Process and that Ohio patients given medical care at a private hospital cannot be found to have unknowingly waived their constitutional right to a jury trial because of an undisclosed (to the patient) relationship between a resident member of the medical team and a residency program with a State school. [Propositions of law No. 1 through 10]. Petitioner also asserts that retroactive application of a new case to extinguish Petitioner's claim brought 15 years earlier denies due process; and that Ohio Revised Code Chapter 2743 is unconstitutional as applied in this instance to deny petitioner's Constitutional right to a trial by jury. The Ohio Supreme Court declined jurisdiction. [App. 57a]

REASONS FOR GRANTING THE PETITION

This Petition seeks a review of the Ohio Supreme Court's allowing petitioner's fruitless eighteen year legal odyssey of petitioner's quest to have a jury determine her medical malpractice claim for severe brain damage. Does the United States Constitution assure the People due process of law or merely the illusion of justice?

Benjamin Franklin's satirical writing "*How to Make a Great Empire a Small One*" imparts advice to the King of England as to how to make over The Great British Empire into a small one:

> **"To confirm these impressions and strike them deeper, whenever the injured come to the capital with complaints of maladministration, oppression, or**

> **injustice, *punish such suitors* with *long delay, enormous expense and a final judgment in favor of the oppressor.* This will have an admirable effect every way. The trouble of future complaints will be prevented, and governors and judges will be encouraged to further acts of oppression and injustice; and then the people may become more disaffected, and at length desperate."**

Petitioner, Deborah Fisher, has suffered "long delays, enormous expense and a final judgment in favor of the oppressor." Here this young woman's brain was profoundly injured as a result of medical malpractice in 1990. The legal system to which she resorted for just determination of her claim, instead became yet another affliction to her over the course of eighteen years. After denying numerous summary judgment motions over the years, the lower court applied a 2005 Ohio Supreme Court decision made fifteen years after her injury 2005 (*Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559) to dismiss her case, and the Ohio Supreme Court ratified the application. This result is more than a shame, this entire legal odyssey is a disgraceful embarrassment to our basic justice system.

JUSTICE DELAY – JUSTICE DENIED

Clause 40 of the Magna Carta reads: "To no one will we sell, to no one will we refuse or delay, right or justice." The United States Constitution descends in a direct line from the principles of the Magna Carta. But here in 2009, Petitioner is in her Nineteenth year of entrapment within the legal maze.

This case languished for ten (10) years before the first trial judge without ever getting so much as a trial date. The successor trial judge did nothing for three (3) more years, even after plaintiffs' counsel moved and begged the court to place the case on "active docket in April, 2004."

The Rules of Superintendence for Court of Ohio are to ensure the proper administration of the courts. Specifically, Ohio Rule of Superintendence Rule 40 requires a trial judge to review its docket every six months.

> "(A)(1) Each trial judge shall review, or cause to be reviewed, all cases assigned to the judge. Cases that have been on the docket for six months without any proceedings taken in the case, except cases awaiting trial assignment, shall be dismissed, after notice to counsel of record, for want of prosecution, unless good cause be shown to the contrary."

If this is not accomplished the county's administrative judge is to refer this "to the Court Statistical Reporting Section for reporting to the Chief Justice for corrective action." Obviously, these rules were not followed in this case and if so, to no avail.

An appeal was filed on March 29, 2007 and the Ohio appeals court rendered its 14-paged decision one year and five months later (August 15, 2008). The Ohio Supreme Court refused jurisdiction on January 28, 2009. Now to deny this lady her day in court based upon *Comer v. Risko* from 2005 is unconscionable and a true failure of the court system. This so far departs from the accepted and usual course of judicial

proceedings calls for this Court to grant Petitioner's writ to demonstrate that this delay and result is not acceptable legal due process in 2009 in the United States of America.

RIGHT TO JURY TRIAL WAIVED WITHOUT KNOWLEDGE

Any reasonable person would be shocked that a patient can go in for surgery at a "private" hospital as a "private patient" of a neurosurgeon and learn 16 years later that she has no Constitutional Right to her trial by jury to determine negligence and compensation involved in such hospitalization because the chief-resident claims he is a "State employee" because part of his residency of the State University's Medical School involved rotating through this private hospital. How can this happen in the United States? The labyrinth of medical care in this country is perplexing enough, the courts should not allow a patient to be nothing more than a pin-ball in the legal gamesmanship when injured by medical negligence. The anchor of our American justice system is our trial by jury. This Court, as the Guardian of our basic Constitutional right to jury trial, should be concerned that Petitioner can be unknowingly foreclosed from such a basic right under application of the scheme of Ohio laws.

The abridgement of our substantial constitutional right to a jury trial is clearly of public and great general interest and so far departs from the accepted and usual course of judicial proceedings that this Court should exercise its discretion to grant this Petition to continue to protect such a basic right.

Here the record is clear that the Petitioner entered the private hospital under the care and direction of her neurosurgeon (who has no State affiliation). Petitioner had no idea that any State employee would be involved in her care or treatment. This is buttressed by further affidavits of family members and a nurse visitor. At no time did any of the defendants inform Petitioner that any aspect of her care would be provided by an State employee. Therefore, how can Petitioner have been found to have waived her right to a jury trial in this instance?

On the issue of whether a party has validly waived its right to a jury trial, federal case law is clear that any such waiver must be clear and unequivocal. "'[T]he right of jury trial is fundamental, [and] courts [must] indulge every reasonable presumption against waiver.'" *Heyman v. Kline*, 456 F.2d 123, 129 (C.A.2, 1972), quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).".. A waiver requires "some express action by the party or his attorney which evidences his decision not to exercise the right [to trial by jury]." *Bowles v. Bennett*, 629 F.2d 1092, 1095 (C.A.5, 1980).

The courts of Ohio cannot abrogate a Citizen's Constitutional right to a jury trial via unknown and undisclosed legal/contractual relationships between hospitals and doctor. This Court in *Aetna Ins. Co. v. Kennedy* (1937), 301 U.S. 389, 393 reiterated:

> *"But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."(Hodges v.. Easton*, 106 U.S. 408, 412, 1 S.Ct. 307; *Slocum v.. New York Life Ins. Co.*, 228 U.S. 364, 385, 33 S.Ct. 523, Ann.Cas.1914D, 1029; *Patton v.. United States*,

281 U.S. 276, 312, 50 S. Ct. 253, 263, 70 A.L.R. 263; *Dimick v.. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 95 A.L.R. 1150; *Foust v.. Munson S. S. Line,* 299 U.S. 77, 84, 57 S.Ct. 90).

This Court is the guardian of the basic fundamental rights of United States citizens. Every generation has its "Clarence Earl Gideon" (Gideon v. Wainwright, 372 U.S. 335 (1963). Here another ordinary citizen petitions this court to take this opportunity to inject faith in the system of justice in this United States and see that ordinary Citizens will be protected by this Court.

OHIO COURT OF CLAIMS:

Ohio created the Ohio Court of Claims to which may be an appropriate forum for those injured directly by those clearly in the employ of the State. However, to relegate a citizen to the Court of Claims with no right of trial by jury when there is no indication whatsoever that a State employee is involved, is a subterfuge which should not be countenanced by the courts. A patient who enters a private hospital under the care of a private physician has no reasonable expectation that they are waiving their Constitutional right to trial by jury because one of the residents may be involved in a State institution residency program (and immune from suit as a State employee).

Here the trial court exonerated the neurosurgeon (VanLoveren) even though it was uncontested and admitted that he as "attending physician" had the "ultimate medical responsibility" for the patient and any resident physician was working under the supervision and direction of VanLoveren. Nonetheless

the appellate court affirmed summary judgment because VanLoveren did not have actual knowledge of his residents' negligence until "late in the evening on December 24, 1990." [App.9a]

This decision completely ignores that the residents Defendant Dr. VanLoveren is supervising and is responsible for (Mullen and Osborne) had not done their job all day and failed to monitor plaintiff appropriately. The Ohio Courts ignore their own precedent on this point, that an attending physician is vicariously liable for the acts and/or omissions of residents who are under his direction caring for his patients. (*Baird v. Sickler*, 69 Ohio St.2d 652, 23 O.O. 3d 532, 433 N.E.2d 593 (1982); *Bell v. Mt. Sinai Med. Ctr.*, 95 Ohio App.3d 590, 643 N.E.2d 151 (1994); see also *Rouse v. Pitt Cty. Memorial Hospital*, 343 N.C. 186, 470 S.E.2d 44 (1996)).

Defendant hospital admitted in discovery responses that Dr. Mullen was supervised by Dr. VanLoveren. [T.d. 85, Ans. to Interrog. #16]. Petitioner was denied her right to have these facts determined by a jury.

MISAPPLICATION OF PRINCIPLES OF *RESPONDEAT SUPERIOR*

Just as shocking is that the Ohio courts improperly added a requirement of "actual knowledge" by the master onto settled *respondeat superior* principles before allowing liability to be imposed on the master. This upends the entire doctrine.

This case is a perfect example of legislating from the bench; making new law and extending the law beyond its limits to reach a result. *Respondeat superior*

has never required "actual notice" by the master as an element. If so, the entire legal concept would almost never apply (except criminally). Here it was uncontested and admitted that Dr. VanLoveren, as attending physician, had the "ultimate medical responsibility" for the patient and any resident physician was working under the supervision and direction of VanLoveren. Nonetheless the appellate court affirmed summary judgment because:

> "VanLoveren was not made aware of any problems with Fisher until very late in the evening on December 24, 1990... and he arrived at the hospital within approximately 15 (sic 40) minutes ... and took appropriate measures...Consequently, Dr. Van Loveren was entitled to summary judgment." [App. 9a ¶ 33].

This effect of the decision below is to legally add "actual knowledge" by the master to impose liability -- something that is legally and logically contrary to all agency law.

Under this logic every truck company is off the hook if they do not have "actual knowledge" that their driver is presently running a red light. This legal novelty is purely "result oriented" and denies Petitioner her trial by jury as well as creates dangerous precedent.

DENIAL OF DUE PROCESS WHEN MATERIAL ISSUES OF FACT WERE PRESENT

A. INCOMPLETE MEDICAL RECORD – SUBSEQUENT CREATION

Our nation has recognized the importance of medical records and is currently undergoing the complete overhaul to electronic medical record keeping. The Ohio Legislature has repeatedly demonstrated the importance of medical records of its citizens (protecting the confidentiality; the costs, etc). In fact, the legislature now requires that "all medical records be reviewed" before even being permitted to file a medical negligence claim. (Civil Rule 10 (D)(2) Affidavit of merit; medical liability claim.) The defendants herein admit that the operative report is "an important part of the record" and would contain the "actual details of what occurred." However, these lower courts have trivialized medical records by granting summary judgment where records were missing until created during litigation. The operation herein was December 23, 1990. According to defendants themselves, an operative report is typically dictated immediately after surgery, none was s dictated. It was not until two years later (after suit was filed) that VanLoveren dictated a "detailed" operative report in 1992!

The appellate court here coyly omitted any mention of the 2 year delay:

> "Dr. VanLoveren testified that as soon as he learned that Dr. Mullen had not dictated the operative note, he contacted Dr. Mullen. When Dr. Mullen refused to dictate the operative

> report, Dr. VanLoveren dictated the note himself.....Dr. Rutberg (plaintiff's expert) further testified that the late preparation of the operative note had no causal relationship to any injury Fisher had suffered on December 24. Thus, based upon testimony from Fisher's own expert, the alleged malpractice on December 24 that had allegedly resulted in injury to Fisher and could not, therefore, have created an issue of fact related to Dr. VanLoveren. " [p.8 opinion.]

The appellate court ignored Ohio precedent *Moskovitz v. Mt. Sinai Med. Cntr*, 69 Ohio St.3d 638 (1994), which allows a cause of action for altering medical records. To hold as a matter of law that there can be no cause of action when a physician fails to fulfill his medical duty to complete the medical record and waits to "create" one 2 years later after suit is brought is illogical, but very dangerous precedent. Plaintiff's expert, Dr. Rutberg, testified that "There is no record. I don't think there is a reliable record." [Rutberg depo., p.36, l. 1-6]. When asked if it caused Ms. Fisher's injury, he said: "it didn't cause her injuries, no. It does interfere with knowing what exactly happened." [Rutberg depo. p. 49].

Both the defendant hospital and Defendant VanLoveren owe a duty to Ms. Fisher to have made a "complete and timely" medical record. The defendant hospital did not comply with the Joint Commission on Accreditation of Hospitals standards or Ohio Revised Code §3701.74. Defendants' duty to make a timely and complete medical record is not only to protect the patient's medical well-being, but also to protect the patient's legal rights (*Joint Commission on*

Accreditation of Hospitals Manual). The Ohio Supreme Court has recognized the Joint Commission on Accreditation of Health Organizations (JCAHO) as the standard for hospital operations. (*Albain v. Flowers Hospital,* 50 Ohio St. 3d 251, 256-7 (1990), citing *Jackson v. Power*, 743 P.2d 1376, 1383, fn.13 (1987)).

This "public policy" has been recognized by numerous other courts: *Sweet v. Sisters of Providence*, 881 P.2d 304 (1994) {"public policy that adequate operative notes be kept"}; *Public Health Trust v. Valcin*, 507 So.2d 596 (Fla. 1987) {where a physician fails to dictate an operative note a rebuttable presumption arises and shifts the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed; *Patrick v. Sedwick*, 391 P.2d 453 (Alaska, 1966) {"It is incumbent upon the physician to describe accurately and fully in the report of the operation everything of consequence which was done and which was observed; should be dictated immediately after the operation."} This Court should not permit a lower court to destroy that public trust and duty. The courts of Ohio should not facilitate a physician avoid responsibility by failing to complete a patient's medical record until it can be useful as a defense.

Under these circumstances, a reasonable person could conclude that an operative report was created after litigation in an attempt to destroy or alter evidence of malpractice (*Moskovitz v. Mt. Sinai, supra*). Here the lower courts have determined such conduct, as a matter of law, is not actionable which is clearly contrary to Ohio law and due process. The "causation" red-herring is ridiculous. Under what set of facts could one show that the missing medical record

"caused" the malpractice? If this is permitted to stand then it would be advantageous for a physician to avoid dictation in questionable cases and wait for the litigation. The tail wags the dog to absurdity. This is not a practice that should be supported by the courts of justice.

B. AGENCY- DUAL AGENCY- BORROWED SERVANT – ISSUES OF FACT

The entire premise of the "residency" program is that the resident works under and "at the direction" of the attending physician. The court contradicts the record, which states:"Dr. Mullen was supervised by Dr. VanLoveren and the U.C. Neurosurgery Program. {Answers to Interrogs., filed 2/14/97 p.5}. VanLoveren admits this he as "attending" has the "ultimate medical responsibility for the patient. This court has specifically recognized the value of this tutorial process in *Theobald v. University of Cincinnati*, 111 Ohio St.3d 541, 2006-Ohio-6208 (2006). Defendant neurosurgeon VanLoveren admitted that he, as "attending physician," was the physician with the ultimate medical responsibility for the patient and Petitioner had expert testimony that he was negligent; nonetheless summary judgment was granted in his favor, thereby removing factual determinations from a jury.

A resident who is employed by the private hospital in which they are working, as well as being paid by the State can be a "dual agent" and there is still a basis for direct liability against the private hospital who has the "direction and control" over the resident. None of the courts herein responded to Petitioner's arguments of dual agency or borrow servant liability.

A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. (*Restatement of the Law of Agency 2nd §227*).

Here resident Mullen was, while working at Good Samaritan hospital, subject to its rules and regulations. It was Good Samaritan who disciplined him for failure to complete their medical record and suspended his admitting privileges. If a hospital has the right of control and pays the resident, such is clearly is sufficient to impose direct liability. He is not an "apparent agent", he is an agent in fact and *Comer* should not apply to foreclose Petitioner's right to a trial by jury.

The courts below ignored Ohio's own Ohio Supreme Court precedent in *Halkias v. Wilkoff, Co.*, 141 O.S. 139, 47 N.E.2d 199 (1943) held:

> "Where one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him." (emphasis added)

This theory of "dual agency" although advanced below, was ignored by the lower courts. Other courts which have addressed this precise issue as to "residents" do not penalize the victim and allow the jury to make factual determinations as to agency. (at questions of agency are for the trier of fact and summary judgment is inappropriate. (See: *Kelley v. Rossi*, 481 A.2d 1340 (1985) (Supreme Judicial Court

of Massachusetts); *Smith v. Steinberg*, 481 N.E.2d 1344 (1985); *Shepard v. Sisters of Providence*, 89 Or. App. 59 (1988, Ct. App. Oregon). The record shows Mullen, as neurosurgery resident at Good Samaritan received paychecks from Good Samaritan and University of Cincinnati and was disciplined by Good Samaritan for failure to complete plaintiff's medical records.

This issue of "residency" physicians and immunity is a national issue and the private unknown contractual relationships between hospitals, residents and physicians should not be permitted to abrogate our basic right to a trial by jury in any State.

RETROACTIVE APPLICATION OF NEW CASE LAW: AGENCY- DUAL AGENCY - BORROWED SERVANT – ISSUES FOR JURY

While exonerating the neurosurgeon and the "lowly intern" (Osborne), the only defendant left in the trial court was Good Samaritan Hospital. Twice the trial court denied summary judgment to the hospital, holding:

> "However, since Rutberg's testimony does suggest a deviation on the part of Dr. Mullen, and since his employment status with Good Samaritan as chief neurological resident arguably creates an agency relationship with Good Samaritan for the imposition of respondeat superior liability, the defendants' motion is denied as it relates to Good Samaritan." [App. 55a]
>
> "First, there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr.

> Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which his sufficient to overcome summary judgment. As it appeared to the plaintiff at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice." [App. 43a].

With Petitioner still awaiting a trial setting from the court, the Ohio Supreme Court issued its decision in *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559 in 2005. Agency law in Ohio had been clear for over 70 years, e.g: "For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied." *Losito v. Kruse*, 136 Ohio St. 183, 16 O.O. 185, 24 N.E.2d 705 (1940). However, the *Comer* court held "that agency by estoppel is a derivative claim of vicarious liability whereby the liability of the hospital must flow through the independent-contractor physician. Consequently, there can be no viable claim for agency by estoppel if the statute of limitations against the independent-contractor physician has expired."

Here, even though the claim against Dr. Mullen in the Court of Claims relative to Dr. Mullen was timely

filed (the statute of limitations had not expired), the Ohio courts held "Dr. Mullen's liability was extinguished [by the Court of Claims]. As stated by the Ohio Supreme Court in *Comer,* "in the absence of the tortfeasor's primary liability, there is no liability that may flow through to the hospital on an agency theory." [Court of Common Pleas opinion, March 1, 2007, p.3] [App. 23a].

Clearly Dr. Mullen's personal immunity did not "extinguish" liability for his malpractice, since, as an alleged State employee, his liability was transferred to his employer, the State of Ohio, merely is substituted in his place. This contortion of caselaw 17 years after the fact denies Petitioner her right to a jury trial and leaves her only with an administrative "trial" by a single retired judge in the Ohio Court of Claims. Petitioner must be asking herself what country is she in. Where is her Constitutional right to have a jury determine this controversy in excess of twenty dollars? This is her brain that has been damaged, such deserves more due process than what has been put forward to her after 18 years.

To procedurally corral this victim into the Court of Claims based upon an unknown and undisclosed working arrangement with a State medical school and the private hospital is fundamentally unfair, borderline fraudulent, and a clear denial of due process. This is a recurrent issue, not only in Ohio, which needs this Court's attention and protection.

To let this stand as "justice" this Court will confirm by inaction that we are well on Franklin's road to making our great nation small. Petitioner trusts that the highest court of justice in the United States still is

responsive when the basic Constitutional right to trial by jury is at stake. Petitioner has only one brain to protect and only one system in which to seek justice.

CONCLUSION

Therefore, and for all the foregoing reasons, Petitioner, Deborah L. Fisher respectfully requests that this Court issue a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

DEBORAH L. FISHER

By counsel

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-070228
TRIAL NO. A-9111015

[Filed August 15, 2008]

DEBORAH FISHER,	)
	)
Plaintiff-Appellant,	)
	)
vs.	)
	)
HARRY VAN LOVEREN, M.D.,	)
BRAD OSBORNE, M.D.,	)
MAYFIELD NEUROLOGICAL	)
INSTITUTE,	)
	)
and	)
	)
GOOD	)
SAMARITAN HOSPITAL,	)
	)
Defendants-Appellees.	)
	)

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 15, 2008

John Metz, for Plaintiff-Appellant,

Rendigs Fry Kiely & Dennis, LLP., *Felix J. Gora*, and *Thomas M. Evans,* for Defendants-Appellees Brad Osborne, M.D., and Good Samaritan Hospital,

Reminger & Reminger Co., L.P.A., and *Vincent P. Antaki,* for Defendants-Appellees Harry Van Loveren, M.D., and the Mayfield Neurological Institute.

Note: We have removed this case from the accelerated calendar.

SUNDERMANN, Presiding Judge.

{¶1} Plaintiff-appellant Deborah Fisher appeals from the trial court's entries granting summary judgment to defendants-appellees Harry Van Loveren, M.D., Brad Osborne, M.D., Mayfield Neurological Institute, and Good Samaritan Hospital on her medical-negligence claims.

{¶2} On December 18, 1990, Fisher was admitted to Good Samaritan Hospital. On December 20, 1990, she underwent surgery to drain and remove a cystic tumor in her brain. The surgery was performed by Dr. Van Loveren, an employee of the Mayfield Neurological Institute, with the assistance of Brad Mullen, M.D., the chief neurological resident at Good

Samaritan Hospital and an employee at the University of Cincinnati. During her post-operative period, Fisher was under the care of Dr. Van Loveren, Dr. Mullen, Dr. Osborne, a first-year resident at Good Samaritan, and the nursing staff at Good Samaritan, when her neurological condition significantly deteriorated. Fisher suffered permanent and serious brain damage.

{¶3} In December 1991, Fisher brought suit against Dr. Van Loveren, Dr. Osborne, Dr. Mullen, Mayfield Neurological Institute, and Good Samaritan Hospital. She alleged that they had failed to properly respond to her deteriorating condition and to render the appropriate standard of needed medical care. Dr. Mullen immediately filed a motion to dismiss on the basis that he was a state employee of the University of Cincinnati. Fisher subsequently dismissed Dr. Mullen from the case and filed suit against the University of Cincinnati in the Court of Claims.

{¶4} In January 1998, the Court of Claims issued a decision holding that Dr. Mullen had acted within the scope of his employment with the University of Cincinnati when he had treated Fisher and that he was entitled to personal immunity pursuant to R.C. 2743.02(F) and 9.86 for any medical malpractice he had allegedly committed while treating Fisher. In August 1998, the Tenth Appellate District affirmed the judgment of the Court of Claims.[1] Fisher's suit against the University of Cincinnati is currently pending in the Court of Claims, but it has been stayed pending the outcome of this appeal.

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[1] *Fisher v. University of Cincinnati Med. Ctr.* (Aug. 25, 1998), 10th Dist. No. 98AP-142.

{¶5} In the meantime, Fisher's claims against the other defendants proceeded in the trial court. After lengthy discovery, all the defendants moved for summary judgment. On April 24, 1997, the trial court granted summary judgment to all the defendants except Good Samaritan Hospital. The trial court concluded that Fisher had failed to present any expert testimony that Dr. Van Loveren, Dr. Osborne, or the nursing staff at Good Samaritan Hospital had deviated from the appropriate standards of medical care. The trial court also granted summary judgment to the Mayfield Neurological Institute because the only claim against it had been predicated upon the doctrine of respondeat superior.

{¶6} The trial court, however, found sufficient evidence in the record to create a genuine issue of material fact as to the adequacy of care provided by Dr. Mullen. The trial court further found that Mullen's status as chief neurological resident at Good Samaritan Hospital arguably created an agency relationship with the hospital that was sufficient to overcome summary judgment. Shortly thereafter, Good Samaritan Hospital moved the trial court for reconsideration of its decision, which the trial court denied.

{¶7} In January 2005, Good Samaritan again moved for summary judgment, arguing that it could not be held vicariously liable for the actions of Dr. Mullen because he had been found to be a state employee immune from suit under R.C. 9.86 at the time of the alleged malpractice. The trial court denied its motion in August 2005 on the basis that there was an "apparent agency" between Dr. Mullen and Good Samaritan Hospital.

{¶8} In August 2006, Good Samaritan again moved for reconsideration of the court's ruling on its motion for summary judgment based upon the Ohio Supreme Court's decision in *Comer v. Risko*.[2] In March 2007, the trial court granted the motion on the basis that Good Samaritan's potential vicarious liability for Dr. Mullen's alleged malpractice had been extinguished when Dr. Mullen had been granted immunity under R.C. 2743.02(F) and 9.86 and that no liability could, therefore, attach to Good Samaritan under an apparent-agency theory.

{¶9} Fisher now appeals from each of the trial court's entries granting summary judgment to Dr. Van Loveren, Dr. Osborne, Mayfield Neurological Institute, and Good Samaritan Hospital. She raises four assignments of error for our review. Finding none of her assignments to be meritorious, we affirm the judgment of the trial court.

I. Standard of Review

{¶10} Summary judgment is appropriate when "(1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse

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[2] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712.

to that party."[3] We review a trial court's decision to grant a motion for summary judgment de novo.[4]

I. Dr. Van Loveren and Mayfield Neurological Institute

{¶11} In her first assignment of error, Fisher contends that the trial court erred in granting summary judgment to Dr. Van Loveren and the Mayfield Neurological Institute. Fisher makes three main arguments as to why summary judgment was improvidently granted. First, she argues that the affidavit and deposition testimony of her expert witness, Dr. L. David Rutberg, created a genuine issue of material fact about the care and treatment rendered by Dr. Van Loveren. Next, she contends that there was sufficient evidence to hold Dr. Van Loveren responsible for the actions of Dr. Osborne and Dr. Mullen. Finally, she argues that Dr. Van Loveren could be held liable for the incomplete medical record and the late creation of the operative note for her surgery.

{¶12} During Dr. Rutberg's deposition, his opinions, including those provided in two earlier affidavits, were discussed in detail. Dr. Rutberg was specifically asked about any criticism of Dr. Van Loveren, to which he responded in the negative. Specifically, the following discussions took place:

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[3] *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

[4] *Koos v. Central Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 641 N.E.2d 265.

{¶13} "Q. Doctor, do these appear to be the affidavits you executed?

{¶14} "A. Yes, sir.

{¶15} "Q. Other than what is stated in the affidavits, do you believe that the care provided by Dr. Van Loveren was within accepted medical standards?

{¶16} "A. Yes sir.

{¶17} "Taking a look at the affidavit of September 10, 1996, in paragraph seven or five- * * *

{¶18} "Q. Five.

{¶19} "A. Five. Okay.

{¶20} "Q. You state that, quote, The physicians and nurses responsible for Ms. Fisher on December 24, 1990 failed to render to Ms. Fisher the appropriate standard of care requisite under the circumstances on December 24, 1990. Do you recognize that it is acceptable to have residents respond to problems, and that residents have a duty to report significant findings to the attending physicians?

{¶21} "A. Yes.

{¶22} "Q. Do you agree, without such communication, the attending cannot be expected to be clairvoyant about what might be going on with the patient, and respond to it?

{¶23} "A. Yes.

{¶24} "Do you agree that after Dr. Van Loveren was notified of a problem, he responded promptly?

{¶25} "Yes, he did.

{¶26} * * *

{¶27} "Q. Within the context of your opinions stated in your affidavit as to care rendered by Dr. Van Loveren, what opinion do you have as to – within the context of that affidavit – let me rephrase this. Do you have an opinion whether Dr. Van Loveren's care fell below the accepted standard of care?

{¶28} "A. I don't believe his did, no.

{¶29} "Q. And you have no other opinions as to the standard of care by Dr. Van Loveren outside of what's stated in the affidavits?

{¶30} "A. That's true. That's correct."

{¶31} Thus, Dr. Rutberg testified that his opinions were limited to those set forth in his affidavits, and when asked whether Dr. Van Loveren's care fell below the accepted standards, he testified that it did not. Fisher attempts to cloud the issue with a CT scan that was conducted on December 24, 1990. But Dr. Rutberg's testimony does not support Fisher's assertions; rather, it affirmatively demonstrates the absence of evidence on this issue. As a result, we find her first argument meritless.

{¶32} Fisher next argues that Dr. Van Loveren could have been held vicariously liable for the acts or omissions of Dr. Osborne and Dr. Mullen on December

24, 1990, because as the attending physician he had the ultimate responsibility for her care. Fisher cites a number of cases to support her argument, but they are all factually distinguishable in that the attending physician in each was made aware of what was going on and did not intervene.[5]

{¶33} Here, the record reveals that Dr. Van Loveren was not made aware of any problems with Fisher until very late in the evening on December 24, 1990, and that after being contacted, he arrived at the hospital within approximately 15 minutes.[6] Fisher's expert, Dr. Rutberg, testified that upon his arrival, Dr. Van Loveren took appropriate measures in treating Fisher. Consequently, Dr. Van Loveren was entitled to summary judgment on this argument as well.

{¶34} Furthermore, to the extent that Fisher claims all the defendants should have remained in this case because there had been deposition references to "team" treatment, Dr. Rutberg's opinions given in his

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[5] See *Baird v. Sickler* (1982), 69 Ohio St.2d 652, 433 N.E.2d 593 (where the supreme court held that surgeon could be subjected to vicarious liability for a nurse anesthetist where the surgeon testified not only that he instructed and watched the intubation of the patient, but also that he had "the right and duty to halt the procedure" if he thought something was being done improperly; but the court expressly refused to breathe new life into the "captain of the ship" doctrine).

[6] See *Ferguson v. Dyer*, 149 Ohio App.3d 380, 385-386, 2002-Ohio-1442, 777 N.E.2d 850 (noting that "in Ohio, nearly all the cases examining physician liability [in this context] have been decided on facts in which the physician was exercising direct, personal, and proximate supervision over the hospital employee whose negligence might be imputed to the physician").

deposition and affidavits do not reflect that he agreed with such an assertion. Dr. Rutberg referred to the conduct and actions of specific parties and did not render opinions against the "team." Consequently, the trial court did not err in failing to find a genuine issue of material fact as to this issue.

{¶35} Fisher next contends that Dr. Van Loveren was negligent in failing to dictate the operative note. But the record reveals that Dr. Mullen, the resident doctor involved in the surgery, had the responsibility of dictating the operative note. Dr. Van Loveren testified that as soon as he learned that Dr. Mullen had not dictated the operative note, he contacted Dr. Mullen. When Dr. Mullen refused to dictate the operative report, Dr. Van Loveren dictated the note himself.

{¶36} Fisher's expert, Dr. Rutberg, acknowledged that it was acceptable practice to require a resident to prepare the operative note in a teaching hospital and that it was acceptable for a doctor to rely on the resident and the hospital to make sure an operative report was prepared, or for the hospital to notify the doctor if a report was not prepared. Dr. Rutberg further testified that the late preparation of the operative note had no causal relationship to any injury Fisher had suffered on December 24. Thus, based upon testimony from Fisher's own expert, the alleged failure to dictate the operative report was a separate and unrelated event to the malpractice on December 24 that had allegedly resulted in injury to Fisher and could not, therefore, have created an issue of fact related to Dr. Van Loveren.

{¶37} Likewise, Fisher's effort to liken Dr. Van Loveren's alleged failure to timely dictate the operative report to the "alteration" or "destruction" of medical records in *Moskovitz v. Mt. Sinai Med. Ctr.*[7] is not supported by the evidence of record. In *Moskovitz*, the discovery process produced documentation and deposition testimony that indicated that the defendant physician in that case, Dr. Figgie, had "whited-out" incriminating portions of his original office chart, added exculpatory language to his original office chart and then made copies of the "new" chart, and destroyed his original chart to conceal his failure to detect the plaintiff's cancer and to place blame on the plaintiff.[8] Thus, the discovery testimony from the various witnesses and the "new" office chart and other records were facially contradictory.[9]

{¶38} Here, there was no evidence in the discovery testimony or documentation to indicate anything more than a late dictation of the operative note. There was no evidence that the operative report did not accurately reflect the surgery. Moreover, the plaintiff's allegations in *Moskovitz* were directed to the care and treatment provided during the office visit for which the records were altered. Here, based upon the opinions and testimony of Dr. Rutberg, Fisher's allegations of deviations resulting in injury to her were wholly separate from and not affected by the lapse in preparing an operative note regarding the surgery. Thus, based upon the record and the expert opinion of

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[7] 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331.

[8] Id. at 639-649.

[9] Id.

Dr. Rutberg, there was no issue of fact as to the operative note.

{¶39} Because Fisher failed to present any expert evidence that Dr. Van Loveren had deviated from the standard of care, he was entitled to summary judgment on her claims.[10] Mayfield Neurological Institute was likewise entitled to summary judgment, as Fisher's only claim against it was based upon the doctrine of respondeat superior.[11] As a result, we overrule Fisher's first assignment of error.

II. Dr. Osborne

{¶40} In her second assignment of error, Fisher argues that the trial court erred in granting summary judgment to Dr. Osborne and his employer, Good Samaritan Hospital.

{¶41} It is undisputed that Dr. Osborne was employed as a first-year resident at Good Samaritan Hospital and was paid a stipend for his work. In his deposition, Dr. Rutberg affirmatively averred that Dr. Osborne had not deviated from any standard of care, as evidenced by the following excerpt from his deposition testimony:

{¶42} "Q. I want to get this very clear sir, as to who you think fell below the standard of care in the

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[10] *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 131, 346 N.E.2d 673.

[11] *Wells v. Spirit Fabricating Ltd.* (1996), 113 Ohio App.3d 282, 294, 680 N.E.2d 1046.

management of this patient. Was it Dr. Osborne or was it Dr. Mullen?

{¶43} "A. Primarily Dr. Mullen.

{¶44} "Q. Do you have any criticisms, then of Dr. Osborne that you feel fell below the standard of care?

{¶45} "A. Thinking about it and realizing that he was just a „lowly intern,' no, no. It is Dr. Mullen primarily.

{¶46} "Q. I understand, now, that you do not feel that Dr. Osborne fell below the standard of care, but rather Dr. Mullen fell below the standard of care, is that correct?

{¶47} "A. Yes, sir. * * *"

{¶48} Fisher nonetheless argues that testimony by a Good Samaritan nurse, Kathleen Athanas, that she had to convince Dr. Osborne to call Dr. Mullen on the evening of December 24 created a genuine issue of material fact as to Dr. Osborne's liability. But when Dr. Rutberg was asked about the nurse's testimony in his deposition, he stated as follows:

{¶49} "A. Well I understand that Dr. Osborne had to be convinced to call the attending, if I understand correctly, by the nurse, and apparently he wasn't going to call the attending. This is what I am led to believe. I don't have that in the chart here. If this is the case, then he didn't recognize the dire circumstances.

{¶50} "Q. Are you guessing sir?

{¶51} "A. Yes, I am guessing. It is hearsay. That is why I stand by what I said before.

{¶52} "Q. Based on what you have in the records sir, aside from your guessing which we don't want you to do, based on what's in the records, do you believe that Dr. Osborne deviated from the standard of care?

{¶53} "A. No, I don't. I am troubled by this, but I don't."

{¶54} Thus, contrary to Fisher's assertions, her own expert testified that he had found no breach in the standard of care by Dr. Osborne. Fisher, furthermore, could not have utilized the deposition testimony of Nurse Athanas to establish any deviation from the standard of care by Dr. Osborne.[12] Because the expert testimony presented by Fisher failed to create a triable issue of fact as to whether Dr. Osborne had deviated from the appropriate standard of medical care, the trial court correctly granted summary judgment on Fisher's claim against Dr. Osborne and his employer, Good Samaritan Hospital. We, therefore, overrule her second assignment of error.

III. Good Samaritan Hospital

{¶55} In her third assignment of error, Fisher argues that the trial court erred in granting summary judgment to Good Samaritan Hospital on the basis of

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[12] See *Morris v. Children's Hosp. Med. Ctr.* (1991), 73 Ohio App.3d 437, 444, 597 N.E.2d 1110; *Daly v. Hess*, 2nd Dist. No. 22048, 2008-Ohio-2884,¶21.

the Ohio Supreme Court's decision in *Comer v. Risko*.[13] In her fourth assignment of error, she argues that the trial court's entry of summary judgment for Good Samaritan Hospital violated her constitutional right to a jury trial. Because these assignments of error are interrelated, we address them together.

{¶56} In *Comer v. Risko*, a plaintiff sued a hospital, claiming that two physicians, who it alleged were its agents, had committed malpractice.[14] The plaintiff, however, did not sue the two physicians who had allegedly committed the malpractice. She only sued the hospital.[15] After the statute of limitations on the plaintiff's unasserted malpractice claims had expired, the trial court granted the hospital's motion for summary judgment.[16] The Ohio Supreme Court held that the plaintiff's claim against a hospital for the negligence of an independent-contractor physician was a derivative claim of vicarious liability and that, under established principles of Ohio law, the claim against the hospital for secondary liability necessarily failed if the statute of limitations had expired on the claim against the physician who was allegedly primarily negligent.[17]

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[13] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712.

[14] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712.

[15] Id. at ¶9.

[16] Id. at ¶5.

[17] 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, at paragraphs one and two of the syllabus.

{¶57} In granting Good Samaritan's motion for summary judgment, the trial court in this case found that if any agency relationship had existed between Dr. Mullen and Good Samaritan Hospital, it was the "fictional" relationship of agency by estoppel. Based on our review of the record, we agree with the trial court's determination. At the time of the alleged negligence, the University of Cincinnati maintained the only neurosurgical program in the area. Attending physicians from University Hospital supervised University of Cincinnati neurosurgical residents who rotated through Good Samaritan Hospital. Good Samaritan Hospital contracted with the University of Cincinnati to provide neurological services at Good Samaritan Hospital when Fisher was a patient.

{¶58} The Court of Claims held, and the Tenth Appellate District affirmed its determination, that Dr. Mullen was not an employee of Good Samaritan Hospital at the time of the alleged negligence. Rather, he was a University of Cincinnati employee. The University of Cincinnati, furthermore, was an independent contractor of Good Samaritan Hospital with respect to providing neurological services.

{¶59} Fisher now argues that *Comer* does not apply because Dr. Mullen was an actual agent of Good Samaritan. But the evidence in the record does not support Fisher's argument. Fisher, herself, maintained throughout the litigation that Dr. Mullen was an "apparent" agent of Good Samaritan. In an affidavit attached to her memorandum opposing summary judgment, Fisher parroted the necessary language for an agency-by-estoppel claim, stating that "at no time did Dr. Mullen or anyone on behalf of Good Samaritan Hospital inform me that Dr. Mullen was not an

employee or agent of Good Samaritan Hospital. * * * I believed Dr. Mullen was employed by Good Samaritan Hospital since that is where I had contact with him." Consequently, we cannot conclude that the trial court erred in granting summary judgment to Good Samaritan Hospital on the basis of the *Comer* decision. We, therefore, overrule Fisher's third assignment of error.

{¶60} Finally, Fisher argues that the trial court's entry of summary judgment for Good Samaritan Hospital violated her constitutional right to a jury trial based upon this court's decision in *Vanderpool v. University Hospital.*[18] She argues that, in *Vanderpool,* this court held that a private hospital may be vicariously liable, under respondeat superior, for the acts of its agents, even if the agents are immune from personal liability pursuant to a statute. Consequently, she asserts that she could have maintained her claim against Good Samaritan even though Dr. Mullen had been found to be personally immune from suit. We disagree.

{¶61} *Vanderpool* did not provide Fisher with a right of recovery against Good Samaritan Hospital for two reasons. First, *Vanderpool* was decided before the Ohio Supreme Court's decision in *Comer*. Second, it is factually distinguishable. Central to our holding in *Vanderpool* was the fact that the plaintiff in that case had sought out the clinic of a private hospital for treatment, and had looked to the clinic, rather than any specific doctor, for her care. Here, Fisher had been treating with Dr. Van Loveren and had gone to Good

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[18] 1st Dist. No. C-020020, 2002-Ohio-5092.

Samaritan based upon her relationship with him. Thus, Fisher's claims against Good Samaritan Hospital were more analogous to the claims in *Comer*. Because Fisher's claims against Good Samaritan Hospital were not viable under *Comer* and were factually distinguishable from the claims in *Vanderpool,* she had no right to any trial against Good Samaritan Hospital, let alone a jury trial. As a result, we overrule her fourth assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

DINKELACKER and **WINKLER, JJ.,** concur.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

APPENDIX B

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[Filed March 1, 2007]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

Judge John Andrew West

ORDER AND OPINION GRANTING MOTION TO RECONSIDER, AND GRANTING MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on Good Samaritan Hospital's ("Defendant") "Motion for Reconsideration of Defendant, Good Samaritan Hospital's, Motion for Summary Judgment in Light of New Authority." After hearing oral arguments and reviewing the written memoranda presented by the

parties, the Court finds that Defendant's Motion is well taken.

Summary Judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[1] The burden is upon the party moving for summary judgment to identify "those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims."[2] Whether a genuine issue of material fact exists depends on whether the evidence presents "a sufficient disagreement to require submission to a jury" or whether it is so "one-sided that one party must prevail as a matter of law."[3] Furthermore, the evidence must be construed in the light most favorable to the nonmoving party.[4] When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, the nonmoving party then has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.[5] If the nonmovant does not so respond, summary judgment shall be entered against the nonmoving party.[6]

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[1] / OHIO R. CIV. P. 56(C).

[2] / *Dresher v. Burt* (1996),75 Ohio St.3d 280, 293.

[3] / *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340.

[4] / *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

[5] / *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429.

[6] / *Id.*

Defendant argues that this Court should reconsider its decision rendered August 19, 2005 in light of *Comer v. Risko*.[7] *In Comer,* the Ohio Supreme Court held that "agency by estoppel is a derivative claim of vicarious liability whereby the liability of the hospital must flow through the independent-contractor physician. Consequently, there can be no viable claim for agency by estoppel if the statute of limitations against the independent-contractor physician has expired"[8] Because Dr. Mullen's liability was extinguished by the Court of Claims, Defendant asserts that there is no source upon which the Court can impose secondary liability on Defendant.

Plaintiff argues that this matter is distinct from the facts underlying *Comer*, because this matter involves actual agency rather than agency by estoppel. Plaintiff has cited to no evidence in support of her contention. In fact, the facts asserted in Plaintiff's affidavit support the proposition that this matter involves agency by estoppel. In her affidavit, Plaintiff states:

> At no time did Dr. Mullen or anyone on behalf of Good Samaritan Hospital inform me that Dr. Mullen was not an employee or agent of Good Samaritan Hospital. . . . I *believed* that Dr. Mullen was employed by Good Samaritan Hospital since that is where I had contact with him."[9]

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[7] / (2005), 106 Ohio St.3d 185.

[8] / *Id.* at 191.

[9] / Aff. of Pl., Deborah L. Fisher, at ¶ 4 [emphasis added].

Moreover, the affidavit of Thomas Saladin, M.D., Vice President of Academic Affairs at TriHealth, Inc., supports the proposition that this matter involves agency by estoppel. In his affidavit, Dr. Saladin states:

> The University of Cincinnati maintained the only neurosurgical residency program in this area in 1990 and 1991. Attending physicians form University Hospital supervised University of Cincinnati neurosurgical residents who rotated through Good Samaritan Hospital at that time.[10] Good Samaritan Hospital contracted with the University of Cincinnati to provide neurosurgical services at Good Samaritan Hospital when Deborah Fisher was a patient on or about December 20, 1990 through January 8, 1991.[11] Dr. Bradley Mullen was not an employee of Good Samaritan Hospital; rather, he was an employee with the University of Cincinnati at the time treatment was provided to Deborah Fisher.[12] On or about December 20, 1990 through January 8, 1991, the University of Cincinnati was an independent contractor for purposes of providing neurosurgical services to patients at Good Samaritan Hospital.[13]

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[10] / Aff. of Thomas Saldin, M.D., at ¶ 3.

[11] / *Id.* at ¶ 4.

[12] / *Id.* at ¶ 5.

[13] / *Id.* at ¶ 6.

In the August 19, 2006 decision, this Court determined that "genuine issues of material fact exist as to whether or not an *apparent* agency relationship existed between Dr. Mullen and Defendant, and whether or not Good Samaritan Hospital is vicariously liable for Dr. Mullen's potential malpractice."[14] Dr. Mullens' liability has been extinguished. As stated by the Ohio Supreme Court in *Comer*, "in the absence of the tortfeasor's primary liability, there is no liability that may flow through to the hospital on an agency theory."[15]

Construing the evidence in the light most favorable to Plaintiff, reasonable minds can come to but one conclusion and that conclusion is adverse to Plaintiff. The Court finds that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law. Defendant's Motion for Summary Judgment is hereby GRANTED. Plaintiff's complaint is hereby dismissed with prejudice. Defendants shall recover from Plaintiff their costs of action.

This entry constitutes a final, appealable order. There is no just reason for delay.

Be it so Ordered.

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[14] / Nunc Pro Tunc Mem. of Decision and Order, at 3 [emphasis added].

[15] / 106 Ohio St.3d at 191.

Date: 3-1-07

/s/
Judge John Andrew West

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[Filed August 19, 2005]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

NUNC PRO TUNC MEMORANDUM OF DECISION AND ORDER

This matter came before the Court on Good Samaritan Hospital ("Defendant's") Motion for Summary Judgment. After hearing oral arguments and reviewing the written memorandum presented by the parties, the Court finds that Defendant's Motion is not well taken and is therefore denied.

This matter arises out of the alleged medical malpractice of Brad Mullen, M.D.

Summary Judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. **Ohio Rule Civ. P. 56**.

When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, "the nonmoving party then has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." **(1997) *Vahila v. Hall*, 77 Ohio St. 3d 421, 429, 674 N.E. 2d 1164, 1171.**

As a preliminary matter, Plaintiff requests that this Court reconsider a decision rendered by Judge Kraft in 1997 granting summary judgment to other defendants that were a party to this action. The Court finds that this request is not well taken and is therefore denied.

Plaintiff's claim against Defendant is a claim for vicarious liability for the alleged tortious conduct of Dr. Mullen. The Court of Claims has previously found that Dr. Mullen was a state employee, acting within the scope of his employment with the University of Cincinnati Medical Center when he treated Plaintiff herein, and that he was, therefore, entitled to personal immunity for medical malpractice allegedly committed while Dr. Mullen treated Plaintiff. The decision of the Court of Claims was affirmed by the Court of Appeals of Ohio Tenth Appellate District. Defendant argues that Plaintiff's claim against Defendant under respondeat superior should be dismissed from this action because Dr. Mullen was found to be an

employee of the University of Cincinnati Medical Center when he treated Plaintiff.

In a decision rendered by Judge Kraft on February 13th, 1998, the Judge wrote, ".. there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr. Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which is sufficient to overcome summary judgment. As it appeared to plaintiffs at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice....Good Samaritan has an avenue of relief against Dr. Mullen as primary tortfeasor, by working through the Court of Claims. Dr. Mullen, a state employee may be sued in the Court of Claims by Good Samaritan, as well as by the original plaintiffs in this action...Thus, Good Samaritan is incorrect in its assertions that a judgment against it in this Court would leave it without recourse against Dr. Mullen, the alleged primary tortfeasor in this case .... Good Samaritan is a proper defendant in this case, and any potential subrogation or indemnity issues should be resolved between the defendants, without depriving the plaintiffs of any cause of action."

Judge Kraft found that a genuine issue of material fact existed as to the liability of Good Samaritan for the actions of Dr. Mullen even though Dr. Mullen was an employee, not of Good Samaritan, but of the State

of Ohio. Defendant is attempting to reargue an issue that Judge Kraft has previously decided upon. Therefore, summary judgment in favor of Defendant and against Plaintiff is inappropriate.

In construing the arguments of Defendant most favorably towards Plaintiff, the nonmoving party, reasonable minds could draw different conclusions from undisputed facts. The Court finds that, in accordance with the decision rendered by Judge Kraft herein, genuine issues of material fact exist as to whether or not an apparent agency relationship existed between Dr. Mullen and Defendant, and whether or not Good Samaritan is vicariously liable for Dr. Mullen's potential malpractice. Therefore, Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER THE ORDER OF THE COURT that the parties herein are to appear before the Court for Report on September 9th, 2005 at 1:45 p.m. to set this matter for trial.

SO ORDERED.

DATE: 8-18-05 /s/
Judge John Andrew West

APPENDIX D

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[Filed August 12, 2005]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

Judge John Andrew West

MEMORANDUM OF DECISION AND ORDER

This matter came before the Court on Good Samaritan Hospital ("Defendant's") Motion for Summary Judgment. After hearing oral arguments and reviewing the written memorandum presented by the parties, the Court finds that Defendant's Motion is well taken and is therefore granted.

This matter arises out of the alleged medical malpractice of Brad Mullen, M.D.

Summary Judgment is proper when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. **Ohio Rule Civ. P. 56.**

When a motion for summary judgment is made and supported by evidence showing that there is no issue of material fact, "the nonmoving party then has a reciprocal burden . . . to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." **(1997) *Vahila v. Hall*, 77 Ohio St. 3d 421, 429, 674 N.E. 2d 1164, 1171.**

As a preliminary matter, Plaintiff requests that this Court reconsider a decision rendered by Judge Kraft in 1997 granting summary judgment to other defendants that were a party to this action. The Court finds that this request is not well taken and is therefore denied.

Plaintiff's claim against Defendant is a claim for vicarious liability for the alleged tortious conduct of Dr. Mullen. The Court of Claims has previously found that Dr. Mullen was a state employee, acting within the scope of his employment with the University of Cincinnati Medical Center when he treated Plaintiff herein, and that he was, therefore, entitled to personal immunity for medical malpractice allegedly committed while Dr. Mullen treated Plaintiff. The decision of the Court of Claims was affirmed by the Court of Appeals of Ohio Tenth Appellate District. Defendant argues that Plaintiff's claim against Defendant under respondeat superior should be dismissed from this action because Dr. Mullen was found to be an

employee of the University of Cincinnati Medical Center when he treated Plaintiff.

In a decision rendered by Judge Kraft on February 13th, 1998, the Judge wrote, "...there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr. Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which is sufficient to overcome summary judgment. As it appeared to plaintiffs at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice....Good Samaritan has an avenue of relief as against Dr. Mullen as primary tortfeasor, by working through the Court of Claims. Dr. Mullen, a state employee may be sued in the Court of Claims by Good Samaritan, as well as by the original plaintiffs in this action...Thus, Good Samaritan is incorrect in its assertions that a judgment against it in this Court would leave it without recourse against Dr. Mullen, the alleged primary tortfeasor in this case....Good Samaritan is a proper defendant in this case, and any potential subrogation or indemnity issues should be resolved between the defendants, without depriving the plaintiffs of any cause of action."

Judge Kraft found that a genuine issue of material fact existed as to the liability of Good Samaritan for the actions of Dr. Mullen even though Dr. Mullen was an employee, not of Good Samaritan, but of the State

of Ohio. Defendant is attempting to reargue an issue that Judge Kraft has previously decided upon. Therefore, summary judgment in favor of Defendant and against Plaintiff is inappropriate.

In construing the arguments of Defendant most favorably towards Plaintiff, the nonmoving party, reasonable minds could draw different conclusions from undisputed facts. The Court finds that, in accordance with the decision rendered by Judge Kraft herein, genuine issues of material fact exist as to whether or not an apparent agency relationship existed between Dr. Mullen and Defendant, and whether or not Good Samaritan is vicariously liable for Dr. Mullen's potential malpractice. Therefore, Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER THE ORDER OF THE COURT that the parties herein are to appear before the Court for Report on September 9th, 2005 at 1:45 p.m. to set this matter for trial.

SO ORDERED.

DATE: 8-12-05 /s/
Judge John Andrew West

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No: A9111015

[Filed April 28, 1998]

DEBORAH L. FISHER,	)
	)
Plaintiff,	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

(Judge Kraft)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND/OR RELIEF FROM JUDGMENT (Civ. R. 60)

This matter came before the Court on plaintiff's Motion for Reconsideration and/or Relief from Judgment (Civ. R. 60), and having reviewed all memoranda filed on behalf of and in opposition to said Motion, and reviewing the record, including all affidavits and depositions filed, the Court hereby holds that the Motion is denied and that the Order Granting

Motion for Summary Judgment which was filed on May 21, 1997 remains in full force and effect.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Reconsideration and/or Relief from Judgment (Civ. R. 60) is hereby denied, and the previous Order Granting Motion for Summary Judgment entered on May 21, 1997 remains in full force and effect.

IT IS SO ORDERED.

_____

Robert S. Kraft, Judge
Hamilton County Court of Common Pleas

_____

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_____

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/s/ _____

Thomas M. Evans (0033430)

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and Brad Osborne, M.D.
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APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A9111015

[Filed April 28, 1998]

DEBORAH L. FISHER, et al.	)
	)
Plaintiffs	)
	)
v.	)
	)
GOOD SAMARITAN HOSPITAL, et al.,	)
	)
Defendants.	)
	)

Judge Kraft

ENTRY GRANTING DEFENDANTS, HARRY VAN LOVEREN, M.D. AND MAYFIELD NEUROLOGICAL INSTITUTE, INC.'S MOTION FOR SUMMARY JUDGEMENT.

This matter came before the Court on Defendants' Motion for Summary Judgement pursuant to Rule 56 of the Ohio Rules of Civil Procedure and Plaintiff's Motion for Reconsideration thereof. The Court, having reviewed the motion, memoranda, affidavits and depositions filed thereon and having considered the

same, hereby finds that Defendants, Harry Van Loveren, M.D. and Mayfield Neurological Institute, Inc.'s Motion for Summary is well taken and therefore ORDERS:

That Defendants' Motion for Summary Judgement be and is hereby granted and Defendants, Harry Van Loveren, M.D. and Mayfield Neurological Institute, Inc. are hereby dismissed thereon.

_____
Judge Kraft

/s/_____
Ann Ruley Combs, OH Reg. 0004810
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Attorney for Defendants,
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/s/_____
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/s/_____
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Attorney for Plaintiffs

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Tel.: (513) 241-8844

* * *

[Certificate of Service omitted in this appendix]

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A9111015

[February 13, 1998]

DEBORAH L. FISHER, et al.	)
	)
Plaintiff	)
	)
-v-	)
	)
GOOD SAMARITAN HOSPITAL, et al.	)
	)
Defendant	)
	)

MEMORANDUM OF DECISION

Kraft, J.:

This matter is before the Court on the plaintiffs' motion to reconsider the Court's opinion granting summary judgment, filed May 7, 1997 and on the defendant, Good Samaritan Hospital's ("Good Samaritan") supplemental motion for summary judgment, filed August 22, 1997. These motions were finally submitted on October 1, 1997. Each motion is hereby DENIED as more fully discussed below.

This is a medical malpractice case, wherein the plaintiff, Deborah Fisher (Fisher), sustained injury while hospitalized at Good Samaritan. She underwent surgery, performed by Harry Van Loveren, M.D. ("Dr. Van Loveren"), an employee of Mayfield Neurological Clinic ("Mayfield). During her post-operative period, she was under the care of, besides Dr. Van Loveren, the following persons: Brad Osborne, M.D. (Dr. Osborne"), a first year resident at Good Samaritan; Brad Mullen, M.D. ("Dr. Mullen"), the chief neurological resident at Good Samaritan and an employee of the University of Cincinnati; and the nursing staff of Good Samaritan. The plaintiffs brought suit against Drs. Van Loveren, Osborne, and Mullen, and against Mayfield and Good Samaritan. Dr. Mullen was dismissed from the case due to his immunity status as an employee of the state of Ohio and an action is pending against him in the Court of Claims. After lengthy discovery, all of the remaining defendants eventually moved for summary judgment.

On April 24, 1997, this Court granted summary judgment with respect to all of the defendants except for Good Samaritan. Having examined all of the evidence, including the deposition testimony and affidavits of the plaintiffs' expert witness, L. David Rutberg, M.D. ("Dr. Rutberg"), this Court concluded that there was no issue of triable fact as to the adequacy of the care provided by Dr. Van Loveren, Dr. Osborne, or the nursing staff of Good Samaritan. Summary judgment was granted as to Drs. Van Loveren and Osborne, as well as to Mayfield, as the only claim against Mayfield appears to have been predicated on the doctrine of respondeat superior. Because there was sufficient evidence to create a genuine issue of material fact as to the adequacy of the

care provided by Dr. Mullen, and because his status as chief neurological resident at Good Samaritan arguably creates and agency relationship with the hospital, summary judgment was denied as to Good Samaritan.

On May 7, 1997, plaintiffs moved this Court to reconsider its decision granting summary judgment or in the alternative for relief from judgment pursuant to Civ. R. 60. A motion to reconsider is governed by the following principles of law:

(1) An entry of judgment is governed by Civ. R. 58. Civ. R. 58(A) provides that judgment is effective *only* when entered by the clerk upon the journal. (emphasis added) *See also St. Vincent Charity Hospital v. Mintz*, 33 Ohio 3d 121 (1987).

(2) [I]n a trial court a motion for reconsideration is not allowed either expressly or implicitly after a final judgment. *Lorain Education Ass'n. v. Lorain Board of Education*, 46 Ohio St. 3d 12, 17 (1989)

(3) A motion for reconsideration filed after final entry of judgment is a nullity. *Pitts v. Ohio Dept. Transportation, et al.*, 67 Ohio St. 24 378 (1981) at syllabus.

(4) Prior to entry of final judgment a motion to reconsider or vacate an interlocutory decision is permissible, and the rule of *Pitts* is inapplicable (*Ohio Bar Liability Ins. Co. v. INA Underwriters Ins. Co.*, C-890651 (1st App. Dist. 11-7-1990) (unreported), *C.C.M. Enterprises, Inc. v. U.S. Fire Ins. Co.*, C-870193 (1st App. Dist. 3-2-1988) (unreported).

(5) An oral decision or a non-final entry of decision is interlocutory in character and is subject to modification at any time prior to final entry of judgment. *Scribner Corp. v. Schneider*, C-890603 (1st App. Dist. 4-24-1991) (unreported); *Ohio Bar Liability Ins. Co., supra*. Until final judgment is entered "the court has inherent power to reconsider any matter." *C.C.M. Enterprises, supra*. "[T]he trial court [can] modify, or even completely eliminate, any part or all of [a] decision at any time prior to the entry of final judgment." *Mason v. Schwartz*, 76 Ohio App. 3d 43 (Ottawa Co. 1991) (citing *Pitts*). *See also Bodo v. Nationwide Insurance Co.*, 75 Ohio App. 3d 499, 503-04 (Trumbull Co. 1991) (motion for reconsideration proper under 54(B) for interlocutory orders prior to final judgment entry).

As no final judgment has yet been filed, a motion to reconsider is properly before the Court. On further review, however, it appears that the plaintiffs have raised no new issues, arguments, or evidence in their motion or supporting memoranda. Instead, they have argued that summary judgment should be denied based on the assertion, which the Court does not doubt, that this has been an expensive case to litigate and that a need to seek reversal at the appellate level, as has been accomplished by counsel in an unrelated case, will create significant and devastating expense. With all due respect to counsel's competence in the area of his expertise, ie, medical malpractice, nonetheless, the Court thoroughly considered all aspects of the case when it ruled on the original summary judgment motions and is not persuaded that it decided wrongly. Expert testimony is required to sustain an action for medical malpractice *(see Clark v. Doe*, (April 23, 1997), Hamilton App. No. C-950667,

unreported, citing *Bruni v. Tatsumi*, (1976), 46 Ohio. St. 2d 127), and the expert testimony presented by the plaintiffs failed to create a triable issue of fact as to a deviation from the standard of care of any defendant except for Dr. Brad Mullen, and Good Samaritan Hospital, via respondeat superior.

The Court now turns to Good Samaritan's supplemental motion for summary judgment. Good Samaritan has contended 1) that it is not vicariously liable for the actions of Dr. Mullen, because he was employed by the state, not Good Samaritan, and 2) that it would be without recourse against Dr. Mullen as the primary tortfeasor, should the plaintiffs win a judgment against it in this Court. Neither of these arguments is well-taken.

First, there is a triable issue of fact as to the liability of Good Samaritan for the actions of Dr. Mullen. Despite the uncontested fact that Dr. Mullen was an employee, not of Good Samaritan, but of the State of Ohio, there remains an apparent agency between Dr. Mullen and Good Samaritan which is sufficient to overcome summary judgment. As it appeared to the plaintiffs at the time of the incident in question that Dr. Mullen was an employee of Good Samaritan, and as Good Samaritan arguably had the right of control over and responsibility for Dr. Mullen's actions at that time, Good Samaritan may be vicariously liable for Dr. Mullen's potential malpractice. *See Clark v. Southview Hospital*, (1994), 68 Ohio St. 3d 435, 628 N.E. 2d 46; *Morris v. Children's Hospital Medical Center*, (1st. Dist., 1991), 73 Ohio App. 3d 437, 597 N.E. 2d 1110.

Second, Good Samaritan has an avenue of relief as against Dr. Mullen as primary tortfeasor, by working through the Court of Claims. Dr. Mullen, a state employee may be sued in the Court of Claims by Good Samaritan, as well as by the original plaintiffs in this action. Further, any case in which a state employee is a third-party defendant may be removed to the Court of Claims. *See* R.C. 2743.03(E). Thus, Good Samaritan is incorrect in its assertions that a judgment against it in this Court would leave it without recourse against Dr. Mullen, the alleged primary tortfeasor in this case. On the other hand, the plaintiffs may not sue Good Samaritan in the Court of Claims (*see* R.C. 2743.02(E)), leaving this Court as the only avenue of relief for the plaintiffs as against Good Samaritan in respondeat superior. Good Samaritan is a proper defendant in this case, and any potential subrogation or indemnity issues should be resolved between the defendants, without depriving the plaintiffs of any cause of action.

Please present an entry accordingly and appear for report on the 16th day of March, 1998, at 9:00 a.m.

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APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No: A-91-11015

[May 21, 1997]

DEBORAH L. FISHER,

Plaintiff

v.

GOOD SAMARITAN HOSPITAL, et al.

Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter corning before the Court on the Motion for Summary Judgment on behalf of defendants, Good Samaritan Hospital and Brad Osborne, M.D., having reviewed all Memoranda filed on behalf of and in opposition to said Motion, and reviewing the record, including the deposition of L. David Rutberg, M.D., plaintiffs expert witness, the Court hereby holds that the Motion is well taken as to defendants Brad Osborne, M.D. and the conduct of any and all nursing

staff and other employees of the Good Samaritan Hospital.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of defendants, Good Samaritan Hospital and Brad Osborne, M.D., is hereby granted as to Dr. Osborne in total, and as to the conduct of the nurses and other agents and employees of Good Samaritan Hospital. However, since Dr. Rutberg's testimony suggests a deviation on the part of Dr. Mullen which arguably creates a *respondeat superior* liability issue as to Good-Samaritan Hospital, the Motion is denied as it relates to Dr. Mullen and Good Samaritan Hospital until further motions/memoranda have been filed and ruled upon.

IT IS SO ORDERED.

_____

Robert S., Kraft, Judge
Hamilton County Court of Common Pleas

Tendered to Mr. Metz on 5/12/97
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APPENDIX I

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A-9111015

[April 24, 1997]

DEBORAH FISHER, et al.	)
	)
Plaintiffs	)
	)
-v-	)
	)
HARRY VAN LOVEREN, M.D., et al.	)
	)
Defendants	)
	)

MEMORANDUM OF DECISION

Kraft, J.:

This matter is before the Court on the motions for summary judgment of the defendants Good Samaritan Hospital ("Good Samaritan") and Brad Osborne, M.D. ("Dr. Osborne"), originally filed March 7, 1995 and renewed February 5, 1996, and the defendants Harry Van Loveren, M.D. ("Dr. Van Loveren") and Mayfield Neurological Institute, Inc. ("Mayfield"), filed February 15, 1996. The motions were held in abeyance in order to allow the plaintiffs to complete their discovery and

were finally submitted without argument on February 14, 1997.

Summary judgment is appropriate when there are no genuine issues of material fact that remain to be litigated and the moving party is entitled to judgment as a matter of law. Civ. R. 56(C); *Celotex Corp. v. Catrett,* (1986), 477 U.S. 317, 327; *Welco Industries, Inc. v. Applied Cos.* (1993), 67 Ohio St. 3d 344; *Williams v. 312 Walnut Ltd. Partnership* (Dec. 31, 1996), Hamilton App. No. C-960368, unreported. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, if any, timely filed in the action and construed most strongly in favor of the non-moving party, show that there is no genuine issue as to any material fact. Civ. R. 56(C); *Welco, supra.*

The burden of establishing that the material facts are not in dispute, and that no genuine issue of fact exists, is on the party moving for summary judgment. *Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112. If the moving party asserts that there is an absence of evidence to establish an essential element of the nonmoving party's claim, the moving party cannot discharge this burden with a conclusory allegation, but must specifically point to some part of the record which affirmatively demonstrates this absence of evidence. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280.

Once a motion for summary judgment has been made and supported as provided in Civ. R. 56(C), the nonmoving party then has a reciprocal burden to set forth specific evidentiary facts showing the existence of a genuine issue for trial and cannot rest on the

allegations or denials in the pleadings. *Wing v. Anchor Media, Ltd. of Texas*, (1991), 59 Ohio St. 3d 108, 111. "Whether a genuine issue exists is answered by the following inquiry: Does the evidence present 'a sufficient disagreement to require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?].'" *Williams, supra* (citing *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 340).

The within action is a medical malpractice action. The plaintiffs' complaint, filed December 17, 1991, alleges that the plaintiff Deborah L. Fisher ("Fisher") underwent neurosurgery on or about December 20, 1990 at the defendant Good Samaritan Hospital while under the care of the defendant Dr. Van Loveren. The complaint further alleges that on or about December 24, 1990, Fisher's neurological condition significantly deteriorated and the defendants failed to properly respond to her deteriorating condition and failed to render to her the appropriate standard of needed medical care.

On a procedural note, subsequent to the submission of the motions, the defendants Dr. Van Loveren and Mayfield filed a motion to strike certain affidavits of Gloria Wirthwine and Elaine Williams filed by the plaintiffs. The defendants submit that such affidavits are replete with hearsay and not based upon personal knowledge. Having reviewed the affidavits and construing all reasonable competing inferences in favor of the plaintiffs, the defendants' motion to strike the affidavits is denied and the Court has considered these affidavits in ruling on the defendants' summary judgment motions.

Turning then to the substance of the defendants' motions. At the time of Fisher's surgery, the defendant Dr. Van Loveren was a surgeon employed by the defendant Mayfield. The defendant Dr. Osborne was a first year surgical resident at the defendant Good Samaritan. The defendant Bradley Mullen, M.D. ("Dr. Mullen"), now dismissed from this action, was in the final year of his neurosurgical residency at the University of Cincinnati and was working as chief neurological resident at the defendant Good Samaritan.

The defendants contend that the plaintiffs have failed to present adequate expert testimony that they deviated from the appropriate standard of medical care. The defendants point out that although the plaintiffs have submitted affidavits from L. David Rutberg, M.D. ("Dr. Rutberg"), a licensed physician and neurosurgeon, indicating generally that the defendants failed to provide appropriate monitoring and surveillance to Fisher, his deposition testimony specifically negates such generalized conclusions as to Dr. Van Loveren and Dr. Osborne.

As to Dr. Van Loveren, Dr. Rutberg testified as follows:

> Q. Other than what is stated in the affidavits, do you believe that the care provided by Dr. Van Loveren was within accepted medical standards?
>
> A. Yes, sir.
>
> . . . .

Q. . . . Do you have an opinion whether Dr. van Loveren's care fell below the accepted standard of care?

A. I don't believe his did, no.

Depo. of Dr. Rutberg, at 44, 78.

As to Dr. Osborne, Dr. Rutberg testified as follows:

Q. I want to get this very clear, sir, as to who you think fell below the standard of care in the management of this patient. Was it Dr. Osborn or was it Dr. Mullen?

A. Primarily Dr. Mullen.

Q. Do you have any criticisms, then, of Dr. Osborn that you feel fell below the standard of care?

A. Thinking about it and realizing that he was just a, quote, "lowly intern", no, no. It is Dr. Mullen primarily.

Q. I understand, now, that you do not feel that Dr. Osborn fell below the standard of care, but rather that Dr. Mullen fell below the standard of care, is that correct?

A. Yes, sir.

. . . .

Q. Based on what you have in the records, sir, aside from your guessing, which we don't want you to do, based on what's in the records, do you feel that Dr. Osborn deviated from the standard of care?

A. No, I don't. I am troubled by this, but I don't.

Depo. of Dr. Rutberg, at 30-31, 80-81.

Based on Dr. Rutberg's testimony, notwithstanding his testimony to the contrary in his affidavits or elsewhere in his deposition, when asked for a bottom line conclusion as to whether or not Dr. Van Loveren or Dr. Osborne deviated from the appropriate standard of care, Dr. Rutberg's answer was always in the negative. Although the plaintiffs vigorously and adamantly argue that these defendants failed to exercise the appropriate standard of care, the testimony of the plaintiff's expert witness, Dr. Rutberg, clearly does not support the plaintiff's assertions and affirmatively demonstrates the absence of evidence on this issue.

In addition, the plaintiffs further allege that Dr. Van Loveren failed to timely dictate his operative report and that such failure deviated from the appropriate standard of medical care. However, even assuming this to be true, Dr. Rutberg specifically testified that the failure to timely dictate the report did not cause Fisher's injury and did not cause the failure of any of the doctors or nurses to monitor Fisher. Depo. of Dr. Rutberg, at 49.

Thus, recognizing that such expert testimony is necessary to sustain an action for medical malpractice, *see Clark v. Doe* (April 23, 1997), Hamilton App. No. C-950667, unreported (citing *Bruni v. Tatsumi* (1976), 46 Ohio St. 2d 127), and that the expert testimony presented by the plaintiffs fails to create a triable issue of fact on the issues relating to the appropriate standard of care and causation, the defendants'

motions are granted as to Dr. Van Loveren and Dr. Osborne. Along the same lines, as it appears that there is no independent basis for the plaintiffs' claim against Mayfield, other than its employment relationship with Dr. Van Loveren, the defendants' motions are also granted as to Mayfield.

Turning finally to the defendant Good Samaritan. As to Good Samaritan, Dr. Rutberg's testimony also suggests that the hospital's nursing staff did not deviate from the appropriate standard of care. *See* Depo. of Dr. Rutberg, at 17-18, 61. However, since Dr. Rutberg's testimony does suggest a deviation on the part of Dr. Mullen, and since his employment status with Good Samaritan as chief neurological resident arguably creates an agency relationship with Good Samaritan for the imposition of respondeat superior liability, the defendants' motion is denied as it relates to Good Samaritan.

Please present an entry accordingly and the remaining parties should appear for a report on the 7th day of May, 1997, at 9:00 a.m.

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APPENDIX J

IN THE SUPREME COURT OF OHIO

Case No. 2008-1921

[Filed January 28, 2009]

Deborah Fisher	)
	)
v.	)
	)
Harry Van Loveren, M.D.,	)
Brad Osbourne, M.D.,	)
Mayfield Neurological Institute,	)
and Good Samaritan Hospital	)
	)

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Hamilton County Court of Appeals; No. C070228)

/s/
THOMAS J. MOYER
Chief Justice

No. 08-1359

Supreme Court, U.S.
FILED
JUN 4 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

DEBORAH L. FISHER,

Petitioner,

v.

HARRY VAN LOVEREN, M.D.; BRADLEY MULLEN, M.D.; BRAD OSBORNE, M.D.; MAYFIELD NEUROLOGICAL INSTITUTE, INC.; THE GOOD SAMARITAN HOSPITAL,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals First Appellate District Of Ohio

RESPONDENTS HARRY VAN LOVEREN, M.D. AND MAYFIELD NEUROLOGICAL INSTITUTE, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a medical negligence action in which Petitioner Deborah L. Fisher alleged that Respondents, Harry Van Loveren, M.D. and Mayfield Neurological Institute, among others, committed malpractice in the care and treatment of Petitioner. Petitioner never asserted any constitutional issues against these Respondents.

The First District Court of Appeals for Ohio grouped the claims against these Respondents into three categories. First, Petitioner alleged that questions of fact existed based on her own expert's affidavits and deposition testimony such that summary judgment was inappropriate. Second, Petitioner alleged that these Respondents should have been vicariously liable for the acts of other individuals when no employment relationship existed and when these Respondents had no knowledge of the problems with Petitioner's health. Third, Petitioner alleges that the preparation of the operative note somehow creates liability when these Respondents were not responsible for preparing the note, and only did so when the individual responsible for its preparation refused to do so. The First District Court of Appeals for Ohio found in favor of these Respondents on all three points. More importantly, the allegations against these Respondents do not involve any federal issues or constitutional questions, but rather raise issues of purely state law.

QUESTIONS PRESENTED FOR REVIEW – Continued

The questions presented for review are as follows:

1. Did the Ohio Supreme Court err in finding no due process was violated in allowing a case to pend for eighteen years before finally granting defendant's third motion for summary judgment?

2. Did the Ohio Supreme Court err by holding that a patient's constitutional right to a trial by jury was unknowingly waived where an attending surgeon at a private hospital utilizes a resident physician who is involved in a State university program (from another hospital) who later claims immunity as a State employee?

3. Did the Ohio Supreme Court err in allowing the lower courts to apply case law from 2005 to the facts of this case which occurred in 1991 to deny petitioner's right to a jury trial of her factual issues?

4. Did the Ohio Supreme Court err in upholding the lower court's finding that *respondeat superior* requires actual knowledge by the master that the servant was negligent before the master can be liable?

5. Did the Ohio Supreme Court err in its ruling in *Comer v. Risko* holding that a plaintiff must sue both the master and servant before a master can be liable under *respondeat superior*, which is contrary to settled principles of agency law?

QUESTIONS PRESENTED FOR REVIEW – Continued

6. Did the Ohio Supreme Court err in denying petitioner her Constitutional due process right to a jury trial when the record demonstrates clear unresolved issues of material fact?

7. Did the Ohio Supreme Court and lower courts err in granting summary judgment to defendants when a physician creates an operative report only after being sued and almost two years after the surgery?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Mayfield Neurological Institute, Inc. is not a subsidiary of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings as it relates to Mayfield Neurological Institute, Inc.

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction on the Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

A. Facts Relevant to the Petition

On December 18, 1990, Appellant was admitted to Good Samaritan Hospital for surgery to drain and remove a cyst in her brain. Appellant underwent neurosurgery on December 20, 1990, which was performed by Van Loveren with the assistance of Drs. Osborne and Mullen, both of whom were residents at the time; the surgery was performed at Good Samaritan Hospital.

The surgery was unremarkable and initially Appellant's recovery was going well. However, Appellant's condition deteriorated on December 24, 1990. Prior to that day, Dr. Van Loveren had visited Appellant on each post-operative day and he had been happy with the progress of her recovery. On December 24, 1990, Appellant was under the watch of resident Dr. Brad Osborne who was a first year surgical resident. Above Dr. Osborne was Dr. Brad Mullen who was in his final year of neurosurgical residency. The record suggests that Dr. Osborne consulted with Dr. Mullen on several occasions during the course of December

24, 1990 concerning the care of Appellant, but that Dr. Van Loveren was never contacted until late in the evening.

When Dr. Van Loveren was finally contacted around 11:00 p.m. the night of December 24, 1990, he immediately rushed to the hospital. He arrived at the hospital at approximately 11:15 p.m. and immediately began to assess the situation, taking immediate measures to improve Appellant's condition.

Based on the above facts, Appellant filed suit in the trial court on December 17, 1991. Through the course of discovery, Appellant identified an expert by the name of Dr. David Rutberg. During Dr. Rutberg's deposition, his opinions, including those provided in the two affidavits he submitted, were discussed in detail. Dr. Rutberg was specifically asked about any criticism he had of Dr. Van Loveren, to which he responded in the negative.

The only allegations against Respondents Dr. Van Loveren and Mayfield Neurological Institute relate to state law claims. At no time did Petitioner allege any federal questions or Constitutional issues.

B. Procedural History and the Opinions Below

This is a medical negligence action in which Petitioner Deborah L. Fisher alleged that Respondents, Harry Van Loveren, M.D. and Mayfield Neurological Institute, among others, committed malpractice in the care and treatment of Petitioner. Petitioner filed

her original Complaint in Hamilton County, Ohio on December 17, 1991.

Van Loveren originally filed a motion for summary judgment on February 13, 1996. The motion for summary judgment was held in abeyance to allow Fisher time to complete discovery. During the course of litigation, Fisher identified her medical expert as Dr. David Rutberg. Dr. Rutberg's deposition was taken on December 19, 1996, and was filed with the trial court on January 24, 1997. Van Loveren's motion for summary judgment, as well as the summary judgment motions of the co-defendants, was submitted without argument on February 14, 1997.

The trial court granted summary judgment in favor of Van Loveren by Memorandum of Decision dated April 24, 1997. Fisher sought reconsideration. Van Loveren opposed Fisher's motion for reconsideration and the trial court affirmed its grant of summary judgment by Memorandum of Decision on February 13, 1998 as to Van Loveren. An Order denying Fisher's motion for reconsideration and/or relief from judgment was placed of record on April 28, 1998. Finally, an Entry finalizing summary judgment in favor of Van Loveren was placed of record also on April 28, 1998.

Fisher timely filed her appeal in the First District Court of Appeals of Ohio following the grant of summary judgment in favor of Good Samaritan Hospital on March 1, 2007. The First District affirmed summary judgment on August 15, 2008. Fisher

timely petitioned the Ohio Supreme Court to take jurisdiction over the case, but the Ohio Supreme Court denied jurisdiction on January 28, 2009.

ARGUMENT OPPOSING CERTIORARI

Before addressing the merits of the Petitioner's proposed basis for review under 28 U.S.C. § 1257(a), these Respondents would first point out that the Petitioner did not raise any constitutional arguments or federal issues as it relates to these Respondents during any of the proceedings before the trial court or the reviewing First District Court of Appeals. A review of the Appellant's Brief filed with the First District Court of Appeals demonstrates that Petitioner has never raised any constitutional questions or federal issues that would warrant this Court's consideration or time. In fact, the only issues on appeal related to these Respondents is found in Assignment of Error No. 1, which argues that issues of material fact existed as to expert criticism and questions over a delay in creation of a medical note; both items involve questions of purely state law.

It is well established that the United States Supreme Court will not decide whether constitutional rights have been violated where federal questions are not seasonably raised in accordance with the requirements of state law. *See Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Edelman v. People of State of Cal.*,

344 U.S. 357 (1953); and *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). Based upon this Court's well-established precedent precluding the review of constitutional issues which were not properly raised during the course of the state review, the Petitioner's attempt to raise due process arguments before this Court for the first time as it relates to these Respondents is improper. For this reason alone, the Petition for Writ of Certiorari should be denied.

Likewise, how state law applies to a particular set of facts is a matter best left to the state supreme court. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The allegations raised by Petitioner against these Respondents are matters of state law. Specifically, Petitioner attempts to hold a doctor responsible for the actions of other providers under a theory of *respondeat superior* when there is no employment relationship involved; the factual assessment of whether *respondeat superior* is applicable requires the application of Ohio law. Because Petitioner does not indicate how the interpretation of the applicable Ohio law by the lower courts conflicts with the U.S. Constitution, or how it raises a federal question, Certiorari should be denied.

Separate and apart from the Petitioner's failure to raise constitutional or federal issues set forth in its Petition for Certiorari as it relates to these Respondents before any Ohio court, Respondents would further argue that the Petitioner's alleged basis for review is neither substantiated in the facts of this

case nor in the well-established law of this Court. A review of the questions presented by Petitioner results in the conclusion that only questions 4 through 7 are relevant to these Respondents.[1] Hence, only those questions will be addressed.

Respondeat Superior Does Not Apply

Petitioner's proposition that the lower courts added an element of "actual notice" to the theory of *respondeat superior* fails because it misstates the actual ruling of the lower court. As this Court has previously stated, "[i]t is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998). However, neither this Court nor any other court or legislative body has ever held a party responsible for the acts of another when no employment relationship or agency relationship exists. The trial court and First District Court of Appeals for Ohio applied well settled law in Ohio that is specifically applicable to this case. This is not a general vicarious liability situation, which usually contains some type of actual agency relationship such

---

[1] Petitioner's Brief does not address the questions presented in the order in which they are listed. However, to avoid confusion, Respondents will address the questions presented in the order in which they are listed.

as in an employer-employee relationship. Rather, this case involves a treating physician and covering physicians who are responsible for the care of the patient while the treating physician is not available. There is no agency relationship here, as in normal vicarious liability situations. In this case, Van Loveren is not an employee of the hospital, nor is he the employer of the residents. Therefore, under Ohio law, liability in this situation is generally based on a physician's direct, personal or proximate supervision over the hospital employee. *See Ferguson v. Dyer*, 149 Ohio App.3d 380, 385-86, 2002-Ohio-1442 (2002).

This Court considered the proposition of such an extension of traditional *respondeat superior* liability in the case of *General Building Contractors Assoc., Inc. v. Pennsylvania*, 458 U.S. 375, 102 S. Ct. 3141 (1982). Liability was imposed by the district court on contractors and their trade associations for the discriminatory acts of a union; this Court reversed finding that "[e]ven if the doctrine of *respondeat superior* were broadly applicable . . . it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship." *Id.* at 392. The reasoning of this Court in the *General Building Contractors Assoc.* case is applicable to the facts of this case:

> At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Equally central to the master-servant relation is the master's

> control over or right to control the physical activities of the servant. The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective-bargaining agreement, is not tantamount to a "right to control" the Union. Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.

Id. at 393-94 (citations omitted). Petitioner would have this Court impose an agency relationship on multiple doctors treating a patient when there is no employment or other type of relationship among those doctors. While Dr. Van Loveren would have the power to oppose treatment by other doctors that he believed was inappropriate, he did not have the power to control the acts of the other treating doctors when he was not around. As is true in virtually every hospital setting, a doctor must rely on other providers to let him or her know of any problems during recovery, and can only be liable for the acts of other providers if he or she knows the inappropriate treatment is being provided and, based on this knowledge, still decides not to act. That is the law in Ohio, and the law that was applied by the lower courts in reaching their decisions.

The suggestion by Petitioner that a truck company would not be responsible for the acts of its drivers when there is no "actual knowledge" is misplaced. No court has ever suggested that the doctrine of *respondeat superior* requires actual knowledge. Rather, the lower courts in this case have recited and followed well-established Ohio law relating to the responsibility of an attending physician only when that attending physician has actual knowledge of improper care and treatment being performed by others involved when there is no employment relationship between that attending physician and the other caregiver(s). *See Baird v. Sickler*, 69 Ohio St.2d 652, 433 N.E.2d 593 (Ohio 1982). There simply is no support under Ohio law or outside the state which would impose liability on a physician for the acts or failure to act by residents if the doctor is not informed of the complications.

No Issues of Material Fact Exist as to these Respondents

At all stages of the proceedings below Petitioner raised the argument that questions of fact precluded the granting of summary judgment. However, the courts below properly applied Ohio law to determine that no questions of fact existed as to these Respondents. It is important to note that the arguments raised by Petitioner relating to the questions of fact dealt with the medical treatment and whether that treatment fell below the accepted standards of care in Ohio.

During the trial court proceedings, Petitioner identified her medical expert. That expert provided an affidavit and was also deposed by defense counsel. In both the affidavit and in his deposition testimony, Petitioner's medical expert unequivocally testified that he had no criticism of Dr. Van Loveren. Hence, there was no issue of fact.

Petitioner also argues that the issue surrounding the creation of a late operative report created a question of fact that violated her due process rights. The issue of the operative report is addressed below.

The Issue Surrounding the Creation of an Operative Report Does Not Support a Cognizable Claim

There is no recognized claim under Ohio law that creates a cause of action for the late creation of an operative report. More importantly, Petitioner twists the facts related to the operative report and ignores her own expert's testimony on this issue. The factual evidence and testimony related to this issue established that the resident was responsible for creating the operative report. Petitioner's own medical expert supported this policy and the reasoning behind it.

When the hospital discovered the oversight on the part of the resident to prepare the operative report, the hospital followed its procedures to make sure a report was prepared. The hospital first contacted the resident to request he prepare the report. When the resident refused to prepare the report the

hospital contacted Dr. Van Loveren as the attending. Pursuant to the policies, Dr. Van Loveren dictated the operative note when it became clear that the resident would not cooperate with either himself or the hospital.

Petitioner cites to the Ohio Supreme Court case of *Moskovitz v. Mt. Sinai Med. Center*, 69 Ohio St.3d 638 (Ohio 1994) for the proposition that Ohio recognizes a cause of action for alteration of medical records. While Petitioner is accurate in stating that Ohio law allows a claim for alteration of medical records, such law does not apply to this case. In *Moskovitz*, the plaintiff alleged a claim for medical malpractice and also sought punitive damages; the conduct supporting the claim for punitive damages was the deliberate alteration of medical records. There, the defendant-surgeon "whited-out" a typed entry in the medical record indicating that it was his decision to merely monitor a growth in the plaintiff's leg because he believed, at that time, the growth was benign. *Id.* at 643. A handwritten notation was inserted which provided that the plaintiff refused a recommended biopsy and follow up work. *Id.* Copies of the new record were distributed to different doctors and hospitals treating the plaintiff. Several months before she died of a malignant soft-tissue cancer that had originated from the growth in her leg, the plaintiff filed a complaint for discovery related to a potential medical malpractice claim. *Id.* at 640-41. The original medical record was eventually recreated during discovery, exposing the doctor's changes. In

reviewing whether punitive damages were appropriately rewarded in that case, the Ohio Supreme Court found that such an intentional alteration of documents was "indicative of actual malice," thereby rendering it necessary to submit the issue of punitive damages to the jury. *Id.* at 652. It further concluded that the doctor's "alteration of records exhibited a total disregard for the law and the rights of [the plaintiff] and her family," in that it was a blatant attempt by the doctor to exculpate himself for his medical negligence while placing the blame on the plaintiff. *Id.* Here there was no operative report ever created. Hence, there was no alteration or destruction of the medical record.

More importantly, Petitioner's own medical expert testified that the late preparation of the operative note had no causal relationship to any injury suffered by Petitioner. Petitioner's medical expert testified that the alleged failure to properly monitor the patient was unaffected and unrelated to the lack of an operative note. Specifically, Petitioner's medical expert was critical of the monitoring of the patient four days after surgery; in fact, following surgery all evidence suggested that the patient was recovering well and that there were no problems during the operation. Overall, Petitioner's expert acknowledged that it is acceptable to require the resident to prepare the operative note, that it is acceptable for a doctor to rely on the resident and the hospital to make sure an operative report is prepared or for the hospital to notify the doctor, and that regardless of the existence

of an operative report it did not result in any alleged injury.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the issues as raised by Petitioner in the Petition for Writ of Certiorari do not involve federal questions or matters of Constitutional law. The sole issues related to these Respondents involve matters of purely state law. Moreover, the courts below properly applied state law. As such, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 08-1359

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DEBORAH L. FISHER,

Petitioner,

v.

HARRY VAN LOVEREN M.D.; BRAD OSBORNE, M.D.; MAYFIELD NEUROLOGICAL INSTITUTE, INC.; THE GOOD SAMARITAN HOSPITAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, HAMILTON COUNTY

BRIEF IN OPPOSITION FOR RESPONDENT GOOD SAMARITAN HOSPITAL

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition, where the issue of the length of the pendency of the action was never raised in the direct Appeal to the State Court of Appeals and, in any event, the Respondents were confronted with the same delay and Petitioner was permitted to try and prove her case, and could not?

2. Whether Petitioner has presented compelling reasons to grant the Petition, where the Petitioner's valid claims are only against Ohio and must be brought in the Ohio Court of Claims subject to its provisions, otherwise the State is immune?

3. Whether Petitioner has presented compelling reasons to grant the Petition, where the Trial Court properly applied an Ohio Supreme Court's ruling to the action at-hand?

4. Whether Petitioner has presented compelling reasons to grant the Petition, where the settled law in Ohio concerning *respondeat superior* does not apply?

5. Whether Petitioner has presented compelling reasons to grant the Petition, where the Ohio Supreme Court has set forth the law on agency which directly applies to the current and pending case?

6. Whether Petitioner has presented compelling reasons to grant the Petition, where there are no material facts at issue?

7. Whether Petitioner has presented compelling reasons to grant the Petition, where the issues surrounding the creation of an operative report does not support a cognizable claim?

PARTIES TO THE PROCEEDING

Bradley Mullen, M.D., listed in the petitioner's caption, is no longer a party in this matter.

STATEMENT PURSUANT TO RULE 29.6

Respondent Good Samaritan Hospital is wholly owned by Catholic Health Initiatives.

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STATEMENT OF THE CASE

A. Procedural Background

Petitioner Fisher filed a medical malpractice Complaint in the Hamilton County Common Pleas Court on December 17, 1991. The Complaint named as Defendants, Dr. Harry Van Loveren, Mayfield Neurological Institute, Dr. Brad Mullen, Dr. Brad Osborne and Good Samaritan Hospital.

Dr. Mullen immediately filed a Motion to Dismiss / Motion for Summary Judgment arguing that he was a State employee of the University of Cincinnati. Dr. Mullen was voluntarily dismissed by Fisher from the action shortly thereafter.

The remaining Defendants filed Motions for Summary Judgment as there was no expert evidence of any asserted malpractice. After Fisher requested additional time to conduct discovery, the Trial Court granted all Motions except that portion of the Motion for Summary Judgment of Good Samaritan Hospital based on an asserted apparent agency potential liability for Dr. Mullen, the State employee.

Fisher's malpractice claims against Dr. Mullen and liability of the University of Cincinnati have been litigated in the Ohio Court of Claims, where valid claims against the State of Ohio must be brought, subject to the parameters of the statutory law pursuant to which Ohio has specifically waived its immunity. In the action filed by Fisher in the Court of Claims against the University of Cincinnati and Dr. Mullen, the Court of

Claims found that Dr. Mullen was acting within the scope of his employment with the University of Cincinnati. The Court of Claims, therefore, determined that Dr. Mullen was entitled to personal immunity pursuant to Ohio Revised Code § 2743.02(F) and Ohio Revised Code § 9.86 for medical malpractice allegedly committed while Dr. Mullen was treating Fisher. *Fisher v. University of Cincinnati*, 1998 WL 542701 (Ohio App. 10th Dist.).

The Tenth District Court of Appeals, in its Decision dated August 25, 1998, affirmed the Decision of the Court of Claims and reiterated Dr. Mullen was entitled to personal immunity.

The Court of Claims action by Fisher against the University of Cincinnati apparently continues. The Court of Claims case concerns the action of the UC employee, Dr. Mullen, relative to his care given to Fisher. In the Court of Claims, while the State of Ohio has waived its immunity defense on such a claim, there is no right to jury trial pursuant to statute under the Court of Claims Act.

A Second Motion for Summary Judgment was filed in this action by Good Samaritan Hospital, after determination by the Twelfth District Court of Appeals concerning the immunity of Dr. Mullen. The Trial Court granted Good Samaritan Hospital's Motion for Summary Judgment. The Trial Court correctly held that Good Samaritan Hospital's potential vicarious liability for Dr. Mullen's asserted malpractice had been extinguished and that, therefore, no liability could flow through to the Hospital on an agency theory.

Fisher timely appealed the Decision to the First District Court of Appeals. The First District Court of Appeals affirmed the judgment of the Trial Court as to all Defendants.

Fisher petitioned the Ohio Supreme Court to accept jurisdiction over this case. The Ohio Supreme Court denied jurisdiction on January 28, 2009.

B. Relevant Facts

The University of Cincinnati maintained the only neurological residency program in the Cincinnati area in 1990 and 1991. Attending physicians from University Hospital supervised University of Cincinnati neurosurgical residents who rotated through Good Samaritan Hospital at that time.

Good Samaritan Hospital contracted with the University of Cincinnati to provide neurological services to Good Samaritan Hospital when Fisher was a patient on or around December 20, 1990 through January 8, 1991. Dr. Brad Mullen was the University of Cincinnati neurosurgical resident who rotated through Good Samaritan Hospital and who was involved with some of the care of Fisher.

Dr. Mullen was never an employee of Good Samaritan Hospital. Rather, Dr. Mullen was always an employee of the University of Cincinnati at the time treatment was provided to Fisher.

From December 20, 1990 through January 8, 1991, the University of Cincinnati was an independent contractor for purposes of providing neurosurgical services to patients at Good Samaritan Hospital.

Fisher was admitted to Good Samaritan Hospital on December 18, 1990, and on December 20, 1990 underwent surgery by Dr. Van Loveren for removal of a brain tumor. Following the operation, she continued under the care of Dr. Van Loveren with the assistance of Dr. Osborne, a resident physician in the employ of Good Samaritan Hospital. Care was also provided by Dr. Mullen. On or about December 24, 1990, Fisher's neurological condition deteriorated and required emergency and urgent care by her physicians.

Recognizing that Dr. Mullen was an employee of the University of Cincinnati and, therefore, an employee of the State, and that any claims against the State must be brought in the Court of Claims, Dr. Mullen was voluntarily dismissed from this action by Fisher. The Trial Court granted the individual doctor-Defendant's Motions for Summary Judgment, correctly finding that Fisher failed to present any expert testimony that Dr. Van Loveren or Dr. Osborne deviated from the appropriate standards of medical care.

The Trial Court originally denied Good Samaritan Hospital's Motion for Summary Judgment because of the suggested deviation on the part of Dr. Mullen. The Trial Court suggested such deviation may create a *respondeat superior* liability issue as to Good Samaritan Hospital.

In the meantime, Fisher filed a claim in the Court of Claims against Dr. Mullen and the University of Cincinnati. The Court of Claims determined that Dr. Mullen was entitled to absolute immunity for Fisher's claims against him. Specifically, the Court of Claims held that: (1) Dr. Mullen was a State employee; (2) Dr. Mullen was an employee of the University of Cincinnati at the time of the action in question; and, (3) Dr. Mullen was entitled to absolute immunity as a State employee and employee of the University of City and, therefore, the University of Cincinnati was liable for the actions or inactions of Dr. Mullen. Such claim, as it is really against the State of Ohio, must proceed in the Court of Claims subject to its provisions.

The Tenth District Court of Appeals, in its Decision dated August 25, 1998, affirmed the Decision of the Court of Claims.

On September 14, 2005, the Ohio Supreme Court issued its Decision in *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005). The Ohio Supreme Court held that, if an agent is not and cannot be liable because of an affirmative defense, settlement or a favorable judgment, no liability exists to flow through to the secondary party, i.e., a hospital under an agency theory. Hence the Trial Court granted Good Samaritan Hospital's Motion for Summary Judgment, and the decision was affirmed on appeal.

REASONS FOR DENYING THE PETITION

The State Court decisions in this case do not conflict with any decision of this Court or any Federal Court of Appeals, nor do they involve any issues other than State law applied to a particular set of facts in a State Court proceeding.

Further, Fisher's position that the length of pendency of this case before the Ohio Trial Court is somehow a "due process violation" is an issue that was not seasonably raised during the state review process, that is, raising the issue as an assignment of error in the State Court of Appeals. Although there is absolutely no due process violation, and the delay affected both parties, this Court does not decide asserted constitutional issues where the assertions have not been timely raised in accordance with the requirements of State law. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Additionally, the Ohio Supreme Court has ruled on the issues raised by Fisher in her Petition. For instance, the lack of an agency relationship between Good Samaritan Hospital and the State employee, Dr. Mullen, has been decided by the Ohio Supreme Court in *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005). Matters of State law should be left to the State Supreme Court, and the Ohio Supreme Courts' rulings which directly apply to this case must stand. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Finally, Fisher specifically requests this Court review the Ohio's sovereign immunity and Ohio's Court of Claims process, whereby Ohio has granted through the

Ohio Court of Claims Act, under certain circumstances, the ability to sue the State in the Court of Claims where otherwise there is immunity, but there is no right to jury trial. Again, the State's immunity and its parameters for waiving that immunity are the province of the State and its legislature, not Federal "super review" over states' immunity rights.

Even if this was a topic subject to this Court's review, which it is not, the issue is not involved here in any event as Good Samaritan Hospital was properly dismissed by the Ohio Common Pleas Court as a matter of law. Any arguments of Fisher about the Court of Claims procedure should be raised in that action involving the City of Cincinnati.

Finally, Fisher's arguments for review in this Court are belied by the facts, the well-established law of Ohio case law and Ohio statutes applicable to the action at-hand.

There is simply no compelling need for this Court to address any of the issues or non-issues raised in Petitioner Fisher's questions presented herein. Fisher has not in any way carried her burden of demonstrating any "compelling reasons" for the Petition herein to be granted. *See Sup. Ct. R. 10.*

Because Dr. Mullen was properly granted summary judgment by the Trial Court and his dismissal is not contested in this Petition, he is not mentioned specifically herein.

Finally, as only the first three questions of Fisher raised in her brief involve Good Samaritan Hospital, these three issues are refuted in the following arguments. Insofar as Fisher's other arguments affect Co-Respondents, Co-Respondents' arguments contained in their brief are incorporated herein.

ARGUMENTS OPPOSING CERTIORARI

I. There Is No Unilateral "Due Process" Violation Based On The Length Of Pendency Of This Case As The Delay Applied To Both Parties, And In Any Event The Issue Was Waived.

Fisher first maintains that "justice delayed is justice denied". Fisher complains of the length of the pendency of the action before the Trial Court. First, this issue was never raised in the direct appeal of this case to the First District Court of Appeals of Ohio. It was therefore never seasonably raised in accordance with the requirements of State Appellate law, and is waived. Further this Court does not hear issues procedurally deficient.

In any event, Fisher's contentions concerning the length of time in which this case languished before the Trial Court is irrelevant. The Defendants were confronted with the same delay as the Plaintiff in the Trial Court. The bottom line, however, is that Fisher was permitted to try and prove her case, which she could not. Both factually and legally, her claims against all of the Defendants / Respondents were properly dismissed.

II. Fisher Is Pursuing Her Appropriate But Sole Remedy In The Ohio Court Of Claims, And No "Right To Jury Trial Was Waived Without Knowledge", As Fisher Has No Right To A Jury Trial On Her Claims Against The State Of Ohio.

Fisher's contention is that she can sue Good Samaritan Hospital in Ohio's Common Pleas Court, and therefore she is entitled to a potential jury trial in the Ohio State Trial Court, even though the sole basis for the suit is an "agent by estoppel" theory regarding the actions of an immune State employee, Dr. Mullen. Fisher suggests that Good Samaritan has some kind of liability for an immune doctor who is not even its employee. This is not the law and in fact the law in Ohio well- settled to the contrary.

The Ohio Court of Claims has previously determined that Dr. Mullen is entitled to absolute immunity for Fisher's claims against him. Specifically, the Court of Claims in the Tenth District Court of Appeals held that Dr. Mullen was an employee of the University of Cincinnati and, therefore, a State employee at the time of the action in question. Hence, Fisher filed suit against the University of Cincinnati in the Court of Claims for asserted recovery of the alleged malpractice of Dr. Mullen.

Yet, Fisher also maintains that she has a direct claim in Ohio's Common Pleas Court, against Good Samaritan Hospital for the actions of Dr. Mullen, a doctor who is not its employee, and is immune.

The Ohio Supreme Court held in *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005), that if the agent is not and cannot be liable because of an affirmative defense, settlement or favorable judgment, no liability exists to flow through to the secondary party, i.e., the hospital, under any agency theory.

"Agency by estoppel" is a derivative claim of vicarious liability and the liability of a hospital must flow through the agent or independent contractor-physician. Agency by estoppel is not a direct claim against the hospital.

In *Comer*, the Ohio Supreme Court held that the expiration of the statute of limitations on a medical malpractice negligence claim against the agent extinguished all liability against the principal. Plaintiff's sole theory in *Comer* against the Hospital was based upon agency by estoppel relationship between the hospital and two treating physicians who allegedly misinterpreted the Plaintiff's X-ray films. The doctors were not parties because the statute of limitations expired. As in the case presented here, the Plaintiff in *Comer* was pursuing a direct claim against the hospital premised solely upon the negligence of agents who could not be found liable. The Ohio Supreme Court determined in *Comer* that there was no actionable claim against the hospital since there was no actionable claim against the agent.

Agency by estoppel is not a direct claim against the hospital, but is an indirect claim for the vicarious liability of the agent. There can be no viable claim for agency by estoppel when the statute of limitations against the

agent has expired. Otherwise, the hospital becomes primarily responsible under what is, in effect, strict liability or liability without fault.

Here, statutory immunity is the vehicle that bars this action against the agent, Dr. Mullen. Good Samaritan Hospital cannot be held vicariously liable for the actions of the apparent agent, Dr. Mullen, because he is immune from liability under Ohio Revised Code § 2743.02(F) and Ohio Revised Code § 9.86.

The Ohio Supreme Court in *Comer* has held that it would be improper to create a new and direct cause of action that would impose primary liability upon a hospital, which would violate principals that form the basis of vicarious liability. *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005).

Dr. Mullen cannot be held liable since he has been dismissed from this case, has been adjudged statutorily immune as a State employee acting within the course and scope of his employment.

Unlike the *Comer* case, however, Fisher does have an alternative remedy. Fisher is pursuing a case in the Ohio Court of Claims to recover for the alleged misconduct of Dr. Mullen. The State of Ohio employed Dr. Mullen, served as its principal, and can be accountable for his conduct in the Court of Claims only if negligence is found. Because Dr. Mullen's liability has been extinguished by the Court of Claims, there is no source upon which the Trial Court can impose a secondary liability upon Good Samaritan Hospital.

As Fisher's claims for vicarious liability against Good Samaritan Hospital are not viable, she has no right to any trial, let alone a jury trial.

Further, the Ohio Supreme Court has held that there is no violation of any constitutional right to a jury trial in an action against the State of Ohio in the Court of Claims. See *Pokorny v. Local No. 310*, 38 Ohio St.2d 177, 311 N.E.2d 866 (1974). Fisher cannot defeat Good Samaritan Hospital's liability defenses by arguing she has a right a jury trial when such a right does not exist.

In any event, Fisher's case was properly dismissed as a matter of law by the Trial Court. She is entitled to no trial jury or otherwise against Good Samaritan Hospital.

III. The Ohio Supreme Court's Decision In *Comer*, Directly On Point, Applies To Fisher's Complaint.

Fisher asserts in her third question presented, that there is an improper "retroactive application" of new case law.

It is well-settled in the State of Ohio that a decision by the Ohio Supreme Court is and has always been the law of the State. *State ex rel. Bosch v. Industrial Commission of Ohio*, 1 Ohio St.3d 94, 98, 438 N.E.2d 415 (1982). The Ohio Supreme Court's decision in *Comer* is directly on point with Fisher's arguments and defeats them.

Fisher suggests that she had "vested rights" of pursuing a claim against Good Samaritan Hospital prior

to *Comer*. She is mistaken. It has never been the law in Ohio that a secondary party can be held liable when an agent is and cannot be held liable because of an affirmative defense, settlement or favorable judgment. Here, Dr. Mullen is immune. How then can Good Samaritan Hospital be subject to liability for the actions of Dr. Mullen, when he is immune?

To illustrate the absurdity of Fisher's argument, she seems to maintain that when an Appellate Court issues a decision in a particular action, that decision would not apply to the pending case in which the decision is announced, as the action was filed before the decision was made. It appears Fisher is confusing retroactive application of statutes and analysis related thereto, as contrasted with case law.

The Ohio Supreme Court decision of *Comer v. Risko*, 106 Ohio St.3d 185, 190, 833 N.E.2d 712, 717 (2005) applies to this case, and mandates dismissal of Good Samaritan Hospital. The Ohio case law is clear and on point. The seemingly endless Appellate road of this case must end.

CONCLUSION

Respondents Good Samaritan Hospital and Bradley Mullen respectfully request that the Petition be denied.

Respectfully submitted,

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